

1586
From the Stargrave

REPORTS

OF

Sir EDWARD COKE, Knt.

IN ENGLISH,

IN THIRTEEN PARTS COMPLETE;

WITH

REFERENCES to all the ANCIENT and MODERN
BOOKS OF THE LAW.

EXACTLY TRANSLATED and COMPARED with the First and Last Edition
in FRENCH, and printed Page for Page with the same.

TO WHICH ARE NOW ADDED,

THE RESPECTIVE PLEADINGS,

IN ENGLISH.

VOL. VII.

THE Whole newly REVISED, and carefully CORRECTED and TRANSLATED,
with many additional NOTES and REFERENCES,

By GEORGE WILSON, SERJEANT AT LAW.

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THE HISTORY OF THE

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T H E
T W E L F T H P A R T
O F T H E
R E P O R T S
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*This 12th Report
is cited in 1. Hal. Pl.
Pl. l. 391.*

Sir E D W A R D C O K E, Knt.

Of divers Resolutions and Judgments given upon solemn Arguments, and with great Deliberation and Conference of the reverend Judges and Sages of the Law, in Cases of Law, the most of them very famous, being of the King's especial Reference from the Council-Table, concerning the Prerogative: as for the digging of Salt-Petre, Forfeitures, Forests, Proclamations, &c. And the Jurisdictions of the Admiralty, Common Pleas, Star-Chamber, High Commission, Court of Wards, Chancery, &c. And Expositions, and Resolutions concerning Authorities, both Ecclesiastical and Civil, within this Realm. Also the Forms and Proceedings of Parliaments, both in England and Ireland: with an Exposition of Poynings's Law, &c.

The F I F T H E D I T I O N carefully corrected; with additional REFERENCES to all the later REPORTS.

With two exact TABLES, the one of the NAMES of the CASES, and the other of the PRINCIPAL MATTERS therein contained.

By GEORGE WILSON, Serjeant at Law.

Non est Leges condendi autoritas, ubi non est obediendi necessitas, & e converso.



I HAVE perused this Treatise, intitled,
The Twelfth Part of the Reports of
Sir Edward Coke, Knight, and I do, upon
my reading thereof, conceive the same to
be his Collections, and that the printing
of the same (containing very much good
and useful learning) will be for the good
of this nation, and of the professors of
the common law.

The second of February,
1655.

EDW. BULSTROD.

This not in the 2^d edⁿ

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1841-1842
VOLUME
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FORD and SHELDON's Case. Page [1]

Pasch. 4 Jacobi Regis.

In the Exchequer-chamber.

IN an information in the Exchequer-chamber for the King, against Thomas Ford, Esq. Ralph Sheldon, Esq. and divers others; the case was thus.

Thomas Ford was before the statute of 23 Eliz. a recusant; and for money lent to Sheldon, some before 23 Eliz. and some after, took a recognizance in the names of the other defendants, and took also a grant of a rent-charge to them in fee, with condition of redemption by deed indented: and the recognizance was conditioned for performance of covenants in the said indenture, and afterward the statute of the 29 Eliz. was made, by which it was enacted, that if default of payment was made in any part of payment (viz.) of 20l. for every month, &c. That then and so often the Queen's Majesty by process out of the Exchequer may take, seize, and enjoy all the goods, and two parts, &c. And after the said act, and before the 34th year of the reign of the late Queen, Ford lent divers other great sums of money to Sheldon, and for assurance of it, took a rent-charge by deed indented, with condition of redemption: and took also several recognizances in the names of some of the other defendants, for performance of covenants, &c. as is aforesaid; which recognizances did amount in all to the sum of 21000l. all which were to the use of the said Ford, and to be at his disposition, and they were forfeited: and afterward, viz. 41 El. Ford was convicted of recusancy, and did not pay 20l. *per mensem*, according to the statute. And, if upon all this case the King should have the benefit of these recognizances, was the question.

And this case was debated by counsel learned on both sides in court. And it was objected by the counsel of Ford, that if the recognizance had been acknowledged to Ford himself, they should not be forfeited to the King, for the statute speaks only of goods. And debts are not in-

Information on a forfeiture for recusancy.

1 Hawks's c. 15.

St. 23 El. c. 1.

10 Co. 54.

Hob. 127.

1 Leon. 249.

Post. 131.

St. 29 El. c. 6.

Hob. 205.

8 Co. 33.

Plow. 229.

cluded

cluded within the word (*goods*.) And therefore, if the King grant all the goods which came to him by the attainder of J. S. the patentee shall not have debts due to him, for that the grant only extends to goods in possession, and not to things in action. And this act is a penal law, and shall not be extended by equity.

2. It was objected that these recognizances were acknowledged, to perform covenants in an indenture concerning a rent charge: and therefore favours of the realty, and are not within the intention of the said act, which speaks only of goods.

3. No fraud or covin appears in the case; and then forasmuch as no act of Parliament extends to this case, it was said, that the common law doth not give any benefit to the King: for at the common law, in a far stronger case, if *Cestuy que use* had been attaint of treason; this use forasmuch * as it was but a trust and confidence, of which the law did not take notice, it was not forfeited to the King, and could not be granted: and if an use shall not be forfeited, of which there shall be a *possessio fratris*, &c. and which shall descend to the heir, *a multo fortiori* a mere trust and confidence shall not be forfeited.

Page [2]

St. 29 El. c. 6.
21 Co. 32. b.
* 8 Co. 33.

4. It was objected, that if the forfeiture in this case at the bar accrues to the King, by the statute of 29 Eliz. it ought to be by force of this word (* *goods* :) but that shall not be without question in this case. For Ford hath not any goods, but only a mere trust and confidence, which is nothing in consideration of law.

And the court cannot adjudge that these recognizances belong to the King by equity of the said statute, because it is penal: also one recognizance was taken in the names of some of the other defendants, before the statute of the 29 El. which gave the forfeiture.

And for that reason, it cannot be imagined that it was to defeat the King of a forfeiture, which then was not, *in esse*, but given afterwards.

As to the first objection, it was answered and resolved by all the Barons, and by Popham Chief Justice of England, and divers others of the Justices, with whom they conferred, that if the recognizances had been acknowledged to the party himself, that they were given to the King without question; for personal actions, are as well included within this word, *goods*, in an act of Parliament, as goods in possession. But inasmuch as by the law things in action cannot be granted over, for that cause by his general grant, things in action (which only he may grant by his prerogative) without special words pass not; for what he can grant only by his prerogative, can never pass by general words.

Part XII. FORD and SHELDON's Case.

words. And it was affirmed, that so it had been resolved before, that is to say, that debts were forfeited to the King by the said act of the 29 Eliz. And where the statute saith, "shall take, seize, and enjoy all the goods, and two parts," &c. Although a debt due to a recusant cannot be taken and seised, yet inasmuch as there is another word, viz. *enjoy*, the King may well enjoy the debt; and by process out of the Exchequer levy it, and so "take and seise" refers to two parts of lands in possession, and *enjoy* relates to goods.

As to the second objection. Answer, that it was originally for the loan and forbearance of money. And as well the recognizance as the annuity were made for the security of the payment of the said money: also when the recognizances are forfeited, they are but chattels personal.

As to the third objection. Answer, there was covin apparent: for when he was a recusant continually after that statute of the 23 Eliz. and for *that* chargeable to the King, for the forfeiture given by the same act, it shall be intended that he took these recognizances in the name of others, with an intent to prevent the King of levying of the forfeiture: and all the recognizances, which were taken in other men's names after the said act, shall be presumed in law to be so taken, to the intent to defeat the King of his forfeiture: true it is, that an use or trust shall not be forfeited for treason or other offence by the common law, because it is not a thing of which the common law taketh any notice, for that *Cestuy que use*, hath neither *jus in re*, nor *jus ad rem*; but by the common law, when any act is done with an intent and purpose to defraud the King of his lawful duty, or forfeiture by the common law, or act of Parliament, the King shall not be barred of his lawful duty and forfeiture *per obliquum*, which belongs to him by the law, if the act was done *de directo*. 1 Inst. 172. b.

And therefore if a man outlawed buy goods in the names of others, the King shall have the goods in the same manner, as if he had taken them directly in his own name: so if any accountant to the King purchase lands in the names of others, the King shall seize those lands for money due unto him.

* And this appears by the case of Walter Chirton, Trin. 24 Ed. Page [3]

3. Rot. 4. in *Scaccario*, where the case was, that Walter de Chirton was indebted to the King 1800l. which he had received of the King's treasure, and did purchase certain lands with the King's money; and by covin had caused the vendor to enfeoff his friends in fee to defraud the King, and notwithstanding took the profits himself: and afterwards Walter Chirton

3 Co. 12. b.
 7 Co. 21. b. 29. b.
 8 Co. 171. a.
 10 Co. 114. b.
 11 Co. 90. a.
 92, 93. a.
 Cro. Eliz. 221,
 308.
 Hardr. 25, 26.
 1 Vent. 132.

ton was committed to the Fleet for the said debt. And all the matter was found by inquisition, and by judgment the land was seised into the King's hands *quousque*; for in the case of the King, an act done by covin, *per obliquum*, shall be equal to an act done *de directo*, to the party himself; for *Rex fallere non vult, falli autem non potest*: see another precedent, Trin. 24 Ed. 3, Rot. 11. *extractum Regis*, where one Thomas Favell was Collector of tithes and fifteenths, and was seised of certain lands in fee-simple, and having divers goods and chattels, *Die intromissionis de collectione & levatione* of tenths and fifteenths, *languidus in extremis alienavit tenementa sua & bona & catalla diversis personis*, and died without heir or executor. In this case by the prerogative of the King, process was made as well against the terre-tenants, as against the possessors of the goods and chattels, although they were not executors, &c. *Ad computandum pro collectione prædicta & ad respondendum & satisfaciendum inde Regi, &c. Et hoc per Cancellarium Angliæ et capitales justiciarios Angliæ, et aliorum justiciariorum utriusque Banci; quod nota bene.*

As to the fourth objection, *non refert*, whether the duty to accrue to the King by the common law, or by statute; but be it the one way or the other, no subterfuge that the party can use, can defeat or defraud the King: and although one of the recognizances was taken before the stat. of 29 El. yet that was to his use, and for that it is in the nature of a chattel in him, and was taken in the names of others to prevent the Queen of her forfeiture, which she might have by the act of 23 El. and although Ford was not convicted until 41 El. that is not material, for at all times before that, he was subject to a forfeiture for his recusancy.

Lord St. JOHN *versus* Dean, &c. of
Gloucester. *Pasch. 4 Jac. I.*

In the Chancery, 27 Jun. 29 Eliz. *inter Johannem Dominum S. John de Bletso querentem, & Decanum & Capitalem Glocestriae Defendentes.*

THE case was, that the plaintiff brought a *Quare impedit* in the Common Pleas, against the defendant for the church of Penmark in the county of Glamorgan; which suit was staid by aid prayer, and the record was removed into the Chancery; upon which the plaintiff moved for a *Procedendo*, and upon *Oyer* of cause, before Sir Thomas Bromley Lord Chancellor, in the presence of Sir Gilbert Gerrard Master of the Rolls, and Shute and Wyndham Justices, and Popham Attorney, and Egerton Solicitor of the Queen, the Plaintiff shewed a gift in tail of the said advowson made to his antecessor, in the 18 R. 2. and a verdict for his antecessor in the 12 H. 8. and a presentation by his grandfather to the said church, of a Clerk who was admitted, instituted, and inducted, with possession for certain years, and divers other matters to prove the title of the plaintiff; and yet for this, that the defendant and those from whom he claims, time out of mind, had had the possession of the parsonage as inappropriate, (saving interruption for some small time;) and for this, that it shall be a dangerous precedent to the Queen and others, owners of impropriations, being able to maintain * the appropriations to be perfect in all points and circumstances, which are requisite to the making of an absolute and complete impropriation, the appropriations being made of ancient time:

It was resolved by this court of Chancery, by the advice of the Justices and Counsel learned of the Queen, that no *Procedendo in loquela* should be granted.

Vide Ridley, vol. 153, 154. "the beginning of appropriations and of annuities to be discharged of tithes; it was after Benedict who was the institutor of Monks, &c. And note there the reason of prayer being preferred before preaching.

Vide 155, *ibid.* "That the Saxon Kings appropriated eight churches to the monastery of Croyland, as appears by Ingulphus who was Abbot there."

See also Mr. Selden on this head,

Appropriation. *Procedendo* denied in Chancery.

See Watson's Clergyman's Law 194, 195, 391, &c. Cotton's Records 481, 623. 1 Danv. 510, 511, &c.

Page [4]

Seldeni Specilegium 198, 199. History of Tithes, chap. 12, 13, &c.

THOMAS CRIMES & al. Plaintiffs,
and HENRY SMITH Defendant.

Trin. 30 Eliz.

In the Exchequer-chamber.

Endowment is
presumed when
a vicarage hath
long continued.
See Watson's
Clergyman's
Law, 194, 391,
392, &c.
2 Co. 47.
Bunbury 72, 87,
169, 170.

THE case was such; the Abbot of Sulby held the parsonage of Bulbenham in the county of Leicester appropriate, which as a parsonage impropriate came to King H. 8. by dissolution of monasteries, *anno* 31 H. 8. who in the 37th year of his reign granted it in fee-farm; under which grant the plaintiff claimeth; the defendant had obtained a presentation of the Queen, and to destroy the said impropriation did shew the original instrument of it, *anno* 22 Ed. 4. with condition, that a vicarage should be competently endowed, and alleged that the said vicarage was never endowed. And for that very cause the impropriation was void, and in truth there was no instrument, nor direct proof of any endowment of the vicarage.

But for this, that the said rectory was, during all the time of the impropriation, supposed, reputed, and taken to be appropriate, and by all that time a Vicar presented, admitted, instituted, and inducted as a Vicar rightfully endowed, and paid his first-fruits, and tenths:

It was resolved by all the court, that it shall be presumed that the vicarage in respect of continuance was lawfully endowed, for that *omnia præsumuntur solemniter esse acta*. And it shall be a dangerous precedent to examine the originals of impropriations of any parsonages, and the endowments of vicarages, for that the originals of them in time will perish. And so it was decreed for the plaintiff.

Watson 195.
2 Cro. 252.
Post. 5.

WILLIEM.

WILLIELM. BEDLE *Gen' Quer' &* THOMAS BEARD *Clericus*, JACOBUS WINGFEILD, *Milit' &* MARIA WINGFEILD *Defend'.*

Hil. 4 Jac. I.

THE case was thus: *anno* 31 Ed. 1. the King being seised of the manor of Kimbolton, to which the advowson of the church of Kimbolton was appendant, by his letters patent granted the said manor, with the appurtenances, to Humphrey de Bohun Earl of Hereford in tail general. Humphrey de Bohun, the issue in tail by his deed, in the 40 of Ed. 3. granted the * said advowson then full of an Incumbent to the Prior of Stoneley, and his successors: and at the next * avoidance they held it, *in proprios usus*; and upon this appropriation made, *concurrentibus iis quæ in jure requiruntur*; after the death of the Incumbent, the said Prior and his successors held the said church appropriate, until the dissolution of the monastery, in 27 H. 8. the said manor descended to Edw. D. of Buckingham, as issue to the said estate-tail. And the reversion descended to K. H. 8. The Duke in 13 H. 8. was attaint of high treason, 14 H. 8. the King granted the said manor, &c. with all advowsons appendant, &c. to Rich. Wingfield, and the heirs male of his body, 16 H. 8. It was enacted by Parliament, that the said Duke shall forfeit all manors, &c. advowsons, &c. which he had, &c. in 4 H. 8. The King, *anno* 37 H. 8. granted and sold for money the said rectory of Kimbolton, as impropriate in fee, which by mesne conveyance came to the plaintiff for 1200 l. 37 El. Beard the defendant did obtain a presentation of the Queen by lapse, pretending that the said church was not lawfully appropriate to the said Prior of Stoneley.

1. For this, that Humphrey, who did grant it to the Prior, had nothing in it, for that it did not pass to his ancestor by these words (*manerium cum pertinentibus.*) See Watson 89, 92.
2. Or for this, that he had no more than an estate in tail, and then by his death his grant was void.

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B

But

Chancery.
appropriation
not void because
of an estate-tail
in the patron,
grantor, &c.

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* 8 Co. 144,
145. Watson
189, 190.

4 Co. 31, 33,
34, 47, 62.
1 Co. 122.
2 Co. 32.
10 Co. 64.
10 Co. 95, 97,
107. 1 Co. 22,
3 Co. 84.

1 Co. 50. 3 Co.
31. 6 Co. 66.
7 Co. 19.
Antea 4.

Fitzgib. 91.

But it was resolved by the Lord Ellesmere, Lord Chancellor, with the principal Judges, and upon consideration of precedents, that the plaintiff shall enjoy the said rectory. For although that by any thing which can now be shewn, the impropriation is defective (for by nothing which now appears, the issue in tail had any thing in the advowson at the time of his grant to the said Prior, for that the advowson did not pass by the grant of the King, by those words (*cum pertinentibus*) yet it shall now be intended in respect of the ancient and continual possession, that there was a lawful grant of the King to the said Humphrey, who granted in fee, so that he might lawfully grant it to the said priory, (*Omnia præsumuntur solempniter esse acta.*) And all shall be presumed to be done, which might make the ancient appropriation good: for *tempus est adax rerum*; and records and letters patent, and other writings, either consume or are lost, or embezzled: and God forbid that ancient grants and acts should be drawn in question, although they cannot be shewn, which at first was necessary to the perfection of the thing: and if the appropriation had been drawn in question in the life-time of any of the parties to it, they might have shewn the truth of the matter: but after the death of all the parties, and after so many successions of ages, (in all which the said church was esteemed and allowed to be rightfully appropriate. If any objection or exception should now prevail, the ancient and long possession of the owners of the said rectory should hurt them. For if these objections or exceptions had been made in the lives of the parties, without any question they had been answered, or otherwise in so many successions of ages, it would have been impeached or impugned.

Cafe of Forfeiture by TREASON. Page [6]

*Mich. 4 Jac. Regis. Lord Sheffield v. Ratcliffe
 13. 2am. Note 334. v.
 See the case of Lord Offingham
 v. Carlew 1. And. 39. & Dy. 332. b.*

HIL. 43 Eliz. A case was moved to all the Justices: tenant in tail before the statute of 27 H. 8. made a feoffment in fee, to the use of himself and his wife in tail: and after the statute of 27 H. 8. is made, the husband was attaint of high treason, 31 H. 8. and died, the wife continued in possession and died, their issue enter and die, and this descends to his issue: and all this especial matter is found by an office.

The question was, if the issue in tail, or the King, shall have the land; and it was objected, that the right of the ancient estate-tail cannot be forfeited for divers causes; viz.

1. For this, that the ancient estate was discontinued, and such right of action cannot be forfeited; as it is agreed in the Marquis of Winchester's case.

2. The feoffor himself, as this case is, had not any right to the ancient estate-tail (for by his feoffment his right was utterly gone) when he was attaint, and he cannot forfeit what he hath not.

The issue in tail is remitted to that ancient right which cannot be forfeited: and the new estate-tail which was derived under the discontinuance, and which may be forfeited by the statute of the 26 H. 8. cap. 13. is continued; and by act in law, viz. the descent and remitter avoided: and the estate of the King may be divested out of the King by remitter, which is an act in law. As if discontinuee of tenant in tail grant the land to the King, his heirs, and successors: and the King grant the land to tenant in tail for life, the remainder to his son and heir apparent for life, tenant for life dies, the issue by act in law is remitted: and by this all the estate of the King which he hath under the discontinuance, is divested out of him, and with this accords Plow Com. 489 in Nicol's case: so in the case at bar, the new estate under the continuance which was forfeitable is now purged by the remitter of that ancient right; and the title which the King hath, is by that defeated and avoided.

Forfeiture.
 Treason.
 2 Hawks c. 30.
 sect. 19.
 See Cotton's
 Records 53,
 59, 323, 325,
 333, 338, 345.
 369, 377, &c.
 400, 662, 670,
 699.

*These references
 refer to
 late to
 forfei-
 tures for
 treason: but
 not to as to be applica-
 ble to the arguments of
 3 Co. 1, 2, 3, in this case.
 &c.*

Case of Forfeiture by Treason. Part XII.

Nota.

Resolved that in this case the issue in tail was barred : and that which had been said, answered, confessed, and avoided. For truth it is, that right of action cannot be given to the King, by the statute of the 26 H. 8. But when tenant in tail discontinues his estate to the use of himself in tail, and after is attaint of treason, now by the statute of 26 H. 8. he doth not forfeit only the new estate in tail, but by this the right of the ancient estate is barred for ever : for the words of the statute are, that every offender being lawfully convict of high treason, &c. shall forfeit to the King, his heirs, and successors, all such lands, tenements, and hereditaments, which any such offender shall have of estate of inheritance : by which words, if there was not any saving, the right of the ancient estate-tail was bound, then the saving is, saving to " every person, &c. (other than the offenders, their heirs, " and successors, and such persons as claim to any of their " uses)" all such rights, so that the offender and his heirs are excluded out of the saving : for *heirs* includes all manner of heirs, and for this they are bound by the body of the act.

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And so note a diversity between a naked right of action which is not forfeitable, and an estate of inheritance which is forfeitable, coupled with an ancient right, for which the forfeiture of the possession is barred* by the said act. And when all this appears by office, then is the issue in tail notwithstanding the remitter barred by force of the said act of Parliament, to which all are parties or privies : and it is not like to the case in Plowden's Com. of Remitter, for this is no bar of an ancient right.

A Case

A Case at a Committee concerning BISHOPS.

Pasch. 4 Jac. 1.

AT this Parliament held, *Pasch. 4 Jac. Regis*, it was moved and strongly urged at a grand committee of Lords and Commons in the Painted Chamber, 1. That such Bishops as were made and created after the first day of this session of Parliament were not lawful Bishops.

2. Admitting that they were Bishops, yet the manner and form concerning their seals, styles, process, and proceedings in their ecclesiastical courts were not consonant to law: and their reason was for this, that it is provided by the statute of 1 Ed. 6. cap. 2 that from thence forward Bishops should not be elective, but donative by the letters patent of the King: and that forasmuch as at this day all Bishops are made by election, and not by donation of the King, according to the act; for this reason, if the said act of 1 Ed. 6. be in force from the time that it took its effect, the Bishops so elected are not lawful.

3. By the said act of 1 Ed. 6. it is further enacted, that all summons, citations, and process in ecclesiastical courts, shall be made in the name and style of the King, and that their seals shall be engraven with the King's arms, and that certificate shall be made in the name of the King. And whereas the said act of 1 Ed. 6. was repealed by a special act. 1 *Mariae Parliam. 1. cap. 2. sess. 2.* And the said act 1 Mar. is now repealed by a branch of an act, 1 *Jac. cap. 25. versus finem*; for by the said act it is enacted, that the said act of 1 Mar. shall be expressly repealed: so that the said act of 1 Ed. 6. is now in force.

For when an act of repeal is repealed, the first act repealed is revived, &c. as appears in Spencer's case, 15 Ed. 3. title Petition 2.

And for this it was concluded that the said stat. 1 Ed. 6. c. 2. being in force, by consequence all Bishops made after the act 1 *Jac.* were not lawful Bishops: and for that their style and proceedings after the same act were in the name of the Bishops, and not in the name and under the seal of the King; for this cause the proceedings were unlawful, *Quia non observata forma, infertur adnullatio actus.* And these were matters of great import and consequence.

Bishops whether donative or elective.
Watson's Clergyman's Law, 171.

2 Roll. 342.
1 Inst. 344.

Stat. 1 E. 6. c. 2.
5 Co. 9.
Vide Post. 13.

Note the said stat. is still in force.

Stat. 1 E. 6. c. 2.
& 1 Mar. sess.
2. c. 1. 5 Co. 9.

Note.]

Negatur.

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Vide Cod. 35,
36, 132, 967.This cannot be
by implication.This argument
seems a posse ad
esse, and smells
of court flattery.

As to these objections, upon consideration had of them by commandment of the King, it was answered and resolved by Popham Chief Justice of England, and Coke Attorney of the King, and afterwards affirmed by the Chief Baron and the other Justices then attendant to the Parliament, upon good advice and consideration, that although the said act 1 Mar. be repealed, that yet the said act 1 Ed. 6. cap. 2. for other causes is not now in force, but remains repealed: yet true it is, that when an act of repeal is repealed, the first act, as hath been said, stands in force, and is *implicitè* revived. But it is to be observed, that the said act 1 Ed. 6. was repealed, annulled, and annihilated by three several acts of Parliament: and as a man which is bound by three several bonds, although he break one or two of them, yet the third which remains whole will bind him: so when * the words of three several acts repeal or annul an act, although that one or two of the acts of repeal or annihilation are repealed, yet the other which remains in force, annuls the first act: first of all, the act of 1 Ma. expressly repealed the act of 1 Ed. 6. c. 2. and the act of 1 & 2 Ph. & Ma. hath likewise sufficient words to repeal and annul the said act of 1 Ed. 6. as to the style, seal, and process, in courts-christian, although that the act of 1 Mar. Parlia. 1. had never been made, the words of which act are; and the ecclesiastical jurisdictions of the Archbishops, Bishops, and Ordinaries to be in the same estate for process of suits, punishment of crimes, and execution of censures of the church, with knowledge of causes belonging to the same; and as large in these points as the said jurisdiction was, *anno* 20 H. 8. And although the said act of 1 Mar. hath by express words repealed the said act of 1 Ed. 6. and for that it may be said, that the said act of 1 & 2 Ph. & Ma. could not repeal that which was repealed before: and yet it was resolved that now, inasmuch as the repeal on which the act of 1 Mar. operates, is now annulled and repealed, it follows, that if now the act of 1 & 2 Ph. & Ma. be in force, or if the said act of the 1 Eliz. cap. 1. operate only as to the said act of the 1 & 2 Ph. & Ma. it makes that the said act of 1 Ed. 6. cannot also stand, *Quia leges posteriores priores contrarias abrogant*. But it was objected that the said act of the first and second of Ph. & Ma. is repealed by the statute of 1 El. 1. And it was answered and resolved, that it was enacted by the act of the 1 Eliz. that the said act of 1 & 2 Ph. & Ma. and every branch and article of it (other than for such branches as be hereafter expressed) shall be repealed: and after by the other branch of 1 El. it is enacted, that all other laws, statutes, and every branch thereof repealed and made void by

Part XII. concerning BISHOPS.

by the said act of 1 & 2 of Ph. & Ma. and not in this act especially mentioned and revived, shall remain and be repealed and void, as the same were before the making of the act: but the act of 1 Ed. 6. was, as hath been said, repealed by the act of 1 & 2 Ph. & Ma. and the act of 1 Ed. 6. is not revived specially by the act of 1 Eliz. yet the act of 1 Ed. 6. remains repealed as it was before the second act, which hath sufficient words to repeal and annul the act of 1 Ed. 6. to answer both the objections; the statute of 1 Eliz. cap. 1. revives the act of 25 H. 8. c. 20. and further enacts, that it shall stand in full force and effect, to all intents, constructions, and purposes. And by the said act of the said 25 H. 8. c. 20. it is provided, that at every avoidance of any Archbishop or Bishop, the King, his heirs, and successors, may grant to the Prior and Covent, and the Dean and Chapter, &c. a licence under the great seal, as of old time hath been accustomed, to proceed to the election of an Archbishop or Bishop, with a letter missive, containing the name of the person which they shall elect and chuse, &c. And further, by another branch in the same act, it is enacted, that every person chosen, elected, and invested, and consecrated Archbishop or Bishop, according to the form and effect of this act, shall do and execute every the thing and things, as any Archbishop or Bishop of this realm, without the offending of the prerogative royal of the crown, and the laws and customs of the realm, might at any time heretofore do: and these two branches answer to both the objections. viz. for the manner of election and consecration of Archbishops and Bishops, and also for the making and execution of all things which belong to their authority, as any Archbishop or Bishop might have done before the making of the said act of 25 H. 8. within which words the style and seal of their court, and the manner of their proceedings are inclosed. And now the act of 1 Eliz. cap. 1. having revived the act of 25 H. 8. and enacted that the same shall stand and be in full force and * strength. to all intents, constructions, and purposes; from hence it follows, that the act of 1 Eliz. reviving the 25 H. 8. hath repealed * the act of 1 Ed. 6. for in an act which was repealed, the repeal is void and annulled: and this was the principal cause of the said resolution, for both the points upon which the said doubts were conceived. And it is to be observed, that the intention of the said repeal by the act of 1 Jac. was to repeal the said act of 1 Mar. — As to an act made 5 Ed. 6. by which it is enacted, “That the matrimony of all and every
“ Priest, and other ecclesiastical and spiritual persons, shall
“ be adjudged, deemed, and taken, for just, true and lawful

Quære de hoc?

Cod. 125, 871.

Conge de Elire.

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* This is not done but by implication, which can never make void a positive law.

“ matrimony, to all intents, constructions, and purposes :
 “ and that all children born in such matrimony shall be
 “ deemed and adjudged, to all intents, constructions, and
 “ purposes, to be born in lawful matrimony, and be legiti-
 “ mate and inheritable, to lands, tenements, and heredita-
 “ ments ; and that they shall be tenants by the curtesy and
 “ tenants in dower, &c.” so that now the said act of 1 Ma.
 being repealed, the said act of 5 Ed. 6. cap. 10. is now in
 force, and the matrimony of all ecclesiastical persons and
 their issue, lawful and legitimate, to all intents, construc-
 tions, and purposes, by which the doubt amongst the vulgar
 is well explained.

But the repeal of all the act of 1 Mar. by which divers
 other statutes were repealed, being repealed generally with-
 out any reference as to the said act of 5 Ed. 6. according to
 the intention of the Parliament *sub silentio*, made the said
 scruple. And yet as it appears by this resolution upon mani-
 fest and direct matter, no inconvenience of the general repeal
 of the said act 1 Mar. doth ensue*.

* But after all
 that is here said,
 it is still held a
 scruple by ma-
 ny ; especially,
 for that a Bishop
 here in England
 is a mere tempo-
 ral officer, and
 may be confi-
 rmed by letters
 patent, as in
 Ireland, &c.
 Vide 8 Co. 68,
 69.

“ And note, by our books it appears, that if a Deacon or
 “ Priest take a wife, the marriage was voidable by divorce,
 “ and not void, for they had not vowed chastity : and for
 “ that, if they had issue, and one of them dies, the issue
 “ should be inheritable. But if a monk or nun, or other
 “ religious person which had made a vow of chastity, had
 “ married, this marriage is void :” and this doth appear 5
 Ed. 2. tit. Nonability 26. 19 H. 7. tit. Bastardy 33. 2 H.
 7. 39. b.

The Case of the STANNARIES.

Mich. 4 Jac. 1.

In the Star-Chamber.

IT was resolved in the Star-chamber in the same term, that the King had not the pre-emption of tin in Cornwall by any prerogative. For *Stanni fodina, nec plumbi fodina, &c.* or other such base mines, do not belong to the King by his prerogative, but to the subject which is owner of the land. But the pre-emption of tin in Cornwall belongs to the King as an ancient rent and inheritance due to the King, as well of tin in the land of the subject as in his proper demesnes: and although that now a reason cannot easily be rendered of things done before time of memory, yet it may well be, that all the land of the county was the demesne of the King; and upon grant of the land the King reserved the mines to himself; for these mines of tin are of great antiquity, as appears after, *ex Diodoro Siculo. Et certo certius est*, that all the land in England is derived mediately or immediately from the crown, for all land is held mediately or immediately of the King; and for this reason such a profit appender may have a reasonable commencement: and where usage hath allowed it to the King, it doth belong to him. True it is, that all the county of Cornwall was within the forest of the King; and that it was disafforested by King John, as appears by Camden, And what consideration the county gave for it to the King concerning tin cannot now appear; but this appears plainly, that before the 33 Ed. 1. all the tin in Cornwall and Devon also, to whomsoever the land belonged, appertained to the King: and this is proved by divers express records, and by an ancient charter of King John amongst the records of the Bishop of Exeter in hæc verbâ. *Johannes Dei gratia Rex Angl', &c. Omnibus Balivis salutem: sciatis quod intuitu Dei & pro salute animæ nostræ, &c. dedimus, concessimus ac præsentī charta nostra confirmavimus Deo & ecclesiæ beati Petri Exon'. & venerabili patri Simoni Exon' Episcopo & successoribus suis Exon' Episcopis, decimam de antiquâ firmâ stanni in com'*

Pre-emption of tin in Cornwall. See Cotton's Records 56, 142, 197, 346, 355. 4 Inst. 229, 238, &c.

Ancient demesne.

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Q

In Registr.

Co. 4. Inst. 232.

com' Devon' & Cornub' : habendum sibi & successoribus suis cum omnibus libertatibus & liberis consuetudinibus ad eam pertinentibus, per manus illius vel illorum qui Stannaria habuerint in custodia, &c.

Paten. 1 H. 3.
Memb. 4.

Rex Roberto de Courtney salutem. Mandamus vobis quod sine dilatione & difficultate aliqua, habere facietis Isabell' Regine matri nostr', Stannaria com' Devon' cum Cuneo & omnibus pertinent'.

Teste Com' Marefcallo, &c.

4 H. 3. Fines
5 H. 3.

Rex concessit Johanni, filio Richardi, Stannaria in Cornubiâ reddendo 1000 marks.

10 H. 3. Memb.
9.

Rex, &c. Sciatis quod concessimus Ricardo dilecto fratri nostro Stannariam nostram Cornub', cum omnibus pertinentibus, with prohibition that none transport any tin without licence of the said Richard.

10 Ed. 2. Inqui.
2 Numero 29.

For this that *decima Stannariæ nostr' in com' Cornub' & Devon'* do belong to the Bishop of Exeter; it was therefore commanded to the said Sheriff to value the said Stannary, so that the Bishop may have that which to him doth belong, viz. *vera decima Stannariæ*; in which note *Stannariæ nostræ*.

33 Ed. 1.
Grant all tin-
ners. Vide Pl.
Com. 327.

It should be apprehend, be tinners, meaning tinners.

Note, there are two several charters, both bearing date 10 Aprilis anno 33 Ed. 1. The one *ad emendationem Stannariarum nostrarum in com' Devon'*: and the other *ad emendationem Stannariarum nostrarum in com' Cornub'*: *concessimus eisdem Stannatoribus quod fodere possunt flannum et turbus ad flannum fundendum ubique in terris nostris, et vastis nostris, et aliorum quorumcunque in comitatu prædicto; & aquas & aquarum cursus divertere, ubi et quoties opus fuerit, &c. ad fundaturam flanni sicut antiquitas consuevit, sine impedimento nostro seu aliorum quorumcunque: ac quod omnes nostri prædicti totum flannum suum ponderatum, &c. licite vendere possunt cuicunque voluerint, faciendo nobis & hæredibus nostris cunageum & alias consuetudines debitas & usitatas nisi nos vel hæredes nostri flannum illum emere voluerimus.*

35 Ed. 1. in the
Treasury.

The liberty granted to tinnery by the said charter, 33 Ed. 1. is by charter 35 E. 1. granted to all tinnery, which charter 33 Ed. 1. made to the tinnery of Devonshire, was confirmed *de verbo in verbo*, anno 4 Ed. 2. and was also confirmed anno 1 & 17 Ed. 3.

Part XII.

Case of the STANNARIES

*De advisamento concilii nostri ordinavimus quod stannum in com' Cornub' & Devon' ad opus nostrum capiatur pro defensione regni nostri, &c. Et ad partes marinas celeriter mittatur, in auxilium & supportationem * honorum nostrorum, &c. Ita quod hominibus quibus stannum illud capi contigerit, de pretio ejusdem stanni ad certos terminos solvend' sufficiens securitas per nos fiat, assignavimus vos conjunctim et divisim ad capiendum, ad opus nostrum, totum stannum in comitatu prædicto cunitum et etiam cunient' cum cunitum fuerunt. And there is also authority given to take carriages tam per naves et batellos in portibus com' prædict' existent' quam carrecta et alia carriagia quæcunque pro stanno illo usque ad Portum Southampton' carriandum: and commandment given to the Sheriffs, quod ipsi sumptis pro carriagiis & aliis necessariis in hac parte inveniendis de exitibus Ballivarum suarum solvant..*

Rot. Ancient,
An. 12 E. 3.
Part 1. Nom. 17.
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Edward the Black Prince being deceased, the King (under the great seal) confirmed (the same year) to Tydman of Limberge, *cunageum Stannar' totius ducatus Cornub' pro tribus annis. Necnon emptionem totius Stanni, tam infra dictum ducatum Cornub' quam com' Devon' fossi et fodendi, quod vendi debeat pro fine mille marcarum, et reddendo tria mille et quingentas marcas.*

21 Ed. 3. ex
Rot. Patent.
Note, the Prince
had this during
his life.

The said charter was confirmed at the suit of the tinnars, § R. 2. 8 Rich. 2, to the tinnars in Cornwall.

The said charter of 33 Ed. 1. to the tinnars of Devon, 1 Ed. 4. was confirmed at the suit of the tinnars, anno 1 Ed. 4.

It was also at their suit confirmed, 3 H. 7. to the tinnars 3 H. 7. of Devon.

Vide the statute of the 11 of H. 7. by which it is ordained, that a certain weight and measure shall be used throughout all England; provided always, that this act extend not, nor be in any wise hurtful or prejudicial to the Prince within the duchy of Cornwall, or any weights belonging to the coinage of tin within the counties of Cornwall and Devon, but that such weigths shall be used, &c. as hath been accustomed.

The

26 Apr. 7 E. 6.
le Roy Morust
in lan. ensuant.
&c.

The King gave Commission and power to Gilbert Broc-house, to have pre-emption for and in the name of the said King of all white tin within Cornwall and Devon, for one and twenty years, yielding three thousand marks rent.

Note, the style of the said courts of Stannaries in Cornwall and Devon, at all times, and during all the reign of Queen Elizabeth, Mar. Ed. 6. H. 8. H. 7. Ed. 4. H. 6. H. 5. H. 4, &c. *Magna curia domini Regis ducatus sui Cornub' apud Crokerenton in com' Devon' coram Johanne Comite Bedford custode Stannar' dicti domini Regis et Reginæ in dicto comitatu Devon:* by which it may appear, that at the first all the tin in the county of Cornwall and Devon belonged to the King: and by, and after the said charters of 33 Ed. 1. the King (or Prince) may buy all if he will.

Camden in
Cornw. f. 13.
Diod. Siculus
floruit sub Au-
gusto.

And note the antiquity of tin-mines in Cornwall. *Vide* Camden in Cornwall, 121. *extremum promontorium quod oraam vergivio incumbit, Diodoro Siculo dicitur Balerium: et vide Diodoro Siculo, lib. 5 c. 8. fol. 142. b. Britanni qui juxta Balerium promontorium incolunt mercatorum usu qui eo stanni, &c.*

And as for that which was objected, that the charter of 33 E. 1. extends only to tin within the land of the King himself: it was resolved, that by the said clause (*fodere & fundere stannum terris nostris & vastis nostris & aliorum quorumcunque, &c. Sicut antiquitas consuevit, &c.*) It is manifest that the King (or Prince) hath all the tin, as well in the land of the subject as in his own proper land.

2. It shall be absurd that the King shall reserve the emption of his own tin.

4 Inst. 229, &c.

3. The King grants *Stannatoribus nostris* divers liberties and immunities which are all enjoyed as well by the tinners in the lands of the subject, as by those in the land of the King, &c.

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The Case of the King's Prerogative in SALT-PETRE.

In the Session of Parliament held in December *anno 4 Jac. Regis.*

ALL the Justices, viz. Popham, Chief Justice of England, Coke Chief Justice of the Common Pleas, Fleming Chief Baron, Fenner, Searl, Yelverton, Williams, and Tanfield, Justices, were assembled at Serjeants-Inn, to consult what prerogative the King had in digging and taking of salt-petre to make gunpowder by the law of the realm; and upon conference between them, these points were resolved by them all, *una voce.*

That although the invention of gunpowder was devised within time of memory, viz. in the time of R. 2. yet inasmuch as this concerns the necessary defence of the realm, he shall not be driven to buy it in foreign parts; and foreign princes may restrain it at their pleasure, in their own dominions: and so the realm shall not have sufficient for the defence of it, to the peril and hazard of it: and therefore inasmuch as salt-petre is within the realm, the King may take it according to the limitations following for the necessary defence of the kingdom.

Although the King cannot take the trees of the subject growing upon his freehold and inheritance, as it was now lately resolved by us the Justices of England: and although he cannot take gravel in the inheritance of the subject, for reparation of his houses, as the book is in 11 H. 4. 28. Yet it was resolved, that he may dig for salt-petre, for this that the ministers of the King who dig for salt-petre, are bound to leave the inheritance of the subject in so good plight as they found it, which they cannot do if they might cut the timber growing, which would tend to the disinherittance of the subject, which the King by prerogative cannot do; for the King (as it is said in our books) cannot do any wrong.

First point.
See Cotton's Records 24. That powder or gunpowder was then in use, viz. 14 E. 3.

Second point.

See Plowd. 246, 247.

And

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And as to the case of gravel, for reparation of the houses of the King, it is not to be compared to this case; for the case of salt-petre extends to the defence of the whole realm, in which every subject hath benefit; but so it is not in the case of the reparation of the King's houses: and therefore it is agreed in 13 H. 4. and other books, that the King may charge the subject for murage of a town, to which the subjects were charged in the time of insurrection or war, for safety: and so for pontage, for this that he which is charged hath benefit by it, but the King cannot charge the subject for the making of a wall about his own house, or for to make a bridge to come to his house; for that doth not extend to public benefit: but when enemies come against the realm to the sea-coast, it is lawful to come upon my land adjoining to the same coast, to make trenches or bulwarks for the defence of the realm, for every subject hath benefit by it. And therefore by the common law, every man may come upon * my land for the defence of the realm, as appears 8 Ed. 4. 23. And in such case on such extremity they may dig for gravel, for the making of bulwarks; for this is for the public, and every one hath benefit by it; but after the danger is over, the trenches and bulwarks ought to be removed, so that the owner shall not have prejudice in his inheritance: and for the commonwealth, a man shall suffer damage; as, for saving of a city or town, a house shall be plucked down if the next be on fire: and the suburbs of a city in time of war for the common safety shall be plucked down; and a thing for the commonwealth every man may do without being liable to an action, as it is said in 3 H. 8. fol. 15. And in this case the rule is true, *Princeps et respublica ex justa causa possunt rem meam auferre.*

Third point.

It was resolved, that this taking of salt-petre is a purveyance of it for the making of gunpowder for the necessary defence and safety of the realm. And for this cause, as in other purveyances, it is an incident inseparable to the crown, and cannot be granted, demised, or transferred to any other, but ought to be taken only by the ministers of the King (as other purveyances ought, and cannot be converted to any other use than for the defence of the realm, for which purpose only the law gave to the King this prerogative. And it is not like to the mines of gold and silver, for there the King hath interest in the metal; and therefore there he

In 2. Apr. 20.
21.

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he may dig for it, *quia quando lex aliquid alicui concedit, concedere videtur id, sine quo res ipsa esse non potest. Vide Plow. in le case de Mines.* So the King may dig in the land of the subject for treasure-trove, for he hath property: and if the powder which is so made by the ministers of the King, begin to decay (as it will in two years) then it ought to be changed for other, or the money coming of it ought to be employed for powder for the defence of the realm; or the ministers of the King ought to make provision of salt-petre which will endure a long time, and when need is, to make it into gun-power, which may be made before the navy can be put in readiness. Plow. 314, 325, 326.

The ministers of the King cannot undermine, weaken, or impair any of the walls or foundation of any houses, be they mansion-houses, or out-houses, or barns, stables, dove-houses, mills, or any other buildings: and they cannot dig in the floor of my mansion-house which serves for the habitation of man; for this, that my house is the safest place for my refuge, safety and comfort, and of all my family; as well in sickness as in health, and it is my defence in the night and in the day, against felons, misdoers, and harmful animals; and it is very necessary for the weal public, that the habitation of subjects be preserved and maintained. Fourth point.

And there are two notable precedents, by which it appears, that the King by his prerogative had power to prohibit depopulation, and provide for habitation.

The one in the 43 Ed. 3. *Rot. claus. in Turri numero 23. pro villa de Southampton.*

The other, anno 21 R. 2. *in dorso clausæ, par. 1 N. 15.* by which the King prohibits that *incol' villarum prædictarum non prosternant domus suas in villis prædictis in alias migraturi regiones, &c.*

Also the ministers of the King cannot dig the floor of any barn employed for the safe custody of any corn, hay, &c. of the owner, for that the floor of a barn cannot be made dry and serviceable again in a long time: but they may dig in the floors of stables and ox-houses. so that there * be sufficient room left for the horses and other cattle of the owner: and so that they repair it in convenient time, in so good plight as it was before; also they may dig in the floors of cellars and vaults, so that there be sufficient room for the necessities of the owner; and so that the wine, beer, and other necessary provision of the owner be not

not removed, or in any sort impaired. And they may dig any mud-walls which are not the walls of any mansion-house, so that order be taken that the mansion-house be well defended, as it was before; and so they may dig in the ruins and decays of any house or buildings, which are not preserved for the necessary habitation of men.

Fifth point.

They ought to make the places, in which they dig, so well and commodious to the owner as they were before.

Sixth point.

They ought to work in the possession of the subject, but betwixt sun-rising and setting; so that the owner may make fast the doors of his house, and put it in defence against misdoers.

Seventh point.

They ought not to place or fix any furnace, vessels, or other necessities in any house or building of the subject without his consent, or so near any mansion-house, as by it it may receive prejudice or disquiet.

Eighth point.

They ought not to continue in one place over a convenient time, nor to return again into the same place before convenient time, (which is long time) be passed.

Ninth point.

It was resolved, that the owner of the land cannot be restrained from digging and taking salt-petre, for the King hath not interest in it as he hath in gold and silver in the land of the subject, for the King in the case of salt-petre hath but purveyance; so that the property of it is in the owner, and for that he cannot be excluded of the commodity in his own land.

And it is to be observed, that before 31 Eliz. which was the next year after the Spanish invasion, there was not any licence or commission of any King or Queen of this realm, for the taking of salt-petre: but in the said 31st year there were two licences granted.

The one particular to George Constable, Esquire, and the other general to George Evelin, Richard Hills, and John Evelin: the first gives Constable power and authority for eleven years to dig, open, and work for salt-petre within the counties of York, Nottingham, Lancaster, Northumberland, Cumberland, and the bishopric

Part XII. of the King in SALT-PETRE.

ric of Duresme, as well within our lands, grounds, and possessions, as also within the lands, grounds, and possessions of any of our loving subjects within the counties aforesaid: and the consideration of the patent was for a great quantity of salt-petre yearly, by the said George Constable, to be made and provided for the store of the Queen, at a lower rate than before was paid.

And further, our will and pleasure is, that the said George Constable, &c. shall at his own proper costs and charges, erect, make up, and raise all mud-walls, stables, and grounds whatsoever so digged up, &c. In which licence it was observed, that no power is given to dig in any mansion-house, barns, dove-houses, &c. but, as appears in the last clause, in mud-walls, stables, and grounds; for the clause of réparation ought without question to extend to all the places to which the power to dig extends, &c.

The other commission to Evelin, &c. extends to all the realm of England * and Ireland, and all other dominions of the King, as well within our own lands, grounds, and possessions, as also within the lands, grounds, and possessions of any of our subjects. Page [15]

Note, the licence begins with lands, &c. so that houses or buildings are not named in it. For the learned counsel of the Queen, as it should seem, who drew the licence, thought not that the licence ought to extend to the mansion-house, or other necessary houses; for otherwise it would have been expressed in the licence. And after, *scilicet* 18 October 2 Jacobi, commission was granted to Evelin and others, to take salt-petre in the lands, possessions, and other convenient places, and in convenient times, so that there were but three licences or commissions ever made. And in none of them any power by express words is given to dig in any mansion-house, &c. And in none of them is any prohibition to the subject to dig in his own land: and it is observed, that in the said last commission is a clause, that for carriage none ought to go above nine miles from his own house, and that he shall have 4d. for every mile laden and empty, viz. *eundo & redeundo*. And the reason was, that the owner may return again to his own house in the same day: and note, reader, here is a good resolution of the Justices for the true prerogative of the King in taking purveyance of salt petre.

GEORGE LEAK's Case.

Hil. 4 Jacobi.

3 Inst. 16.
Treason in pro-
curing the great
seal to a blank,
and then writing
a patent, &c. on
it.

See 1 Hawk,
ch. 17. sect. 47,
48, 49, &c.

IN this very term, one George Leak, a Clerk in Chan-
cery, had upon an ordinary piece of parchment, by great
deceit, fixed with a kind of glue, another parchment so thin
as art could make it, so that it did appear but one piece of
parchment; and upon the thin piece which was as it were the
superficies of the other, he writ by good warrant a licence,
which was brought to the Lord Chancellor and sealed with
the great seal: and after, the said George took the thin piece
upon which the writing was, from the other parchment to
which the great seal was affixed, and then all was a blank
with the great seal annexed: and after the said George writ
upon the blank, a grant of the King of certain lands: and
what offence this was, was this term debated amongst the Jus-
tices; and it was a great question amongst them, whether
this was high treason or no: and it seemed to me, that this
cannot be adjudged high treason, until it was so declared by
Parliament: for true it is, that the statute of 25 Ed. 3. de-
clares that if a man do counterfeit the great seal, or privy seal,
that this is high treason: and true it is, that the Judges in
times past, viz. 2 H. 4. 25. have adjudged that the taking of
the wax which was printed with the great seal, from one pa-
tent, and fixing it to another writing made in the name
of the King is a counterfeiting of the great seal, for this, that
he abuseth the ancient seal, in removing it from the patent,
and fixing it on another without warrant: and so Stam-
ford, lib. 1. fol. 3. proves that it was adjudged in his time:
and yet 40 Ass. pla. 33. that it was petit treason after the sta-
tute: and 37 H. 8. title Treason, Brook, by the Justices
that this was not treason: and I have seen a record of 2 H. 4.
the 25. where the party was indicted generally for counter-
feiting the great seal: and the jury found him not guilty of coun-
terfeiting the great seal, as it was supposed by the indictment:
and found over the especial matter, that he took the great
seal from one patent, and fixed it to another, and put this in
execution: and judgment is given against the party. But
with

Part XII: Case of TREASON.

without question against the law, forasmuch as they found him not guilty of counterfeiting, for this is a full verdict, and all the rest is surplusage; but this case in question much differs from it, for in * this case George Leak hath not any meddling with the great seal, but this remains now annexed as it did before: and for this reason it seems to me, if the seal be fixed to a blank patent, and one writes a grant in it, contrary to his direction and trust; or if one hath letters patent with good warrant made, and them rase in a place material, and puts in other words, to the great prejudice of the King: in none of these cases can it be adjudged a counterfeiting of the great seal. For the statute 25 Ed. 3. doth not speak of counterfeiting writings, but only of the great seal, and the delinquent in this case doth not meddle with the seal, but only with the writing. And I shewed a notable precedent in *Claus. 42 Ed. 3. memb. 8. in dorso*, where the case was, that King R. 1. by his charter granted divers lands and liberties *Abbati de Bruera*, in which the Abbot rased out this word *Fittetrida*, and instead of it writ *Estleigh*. And, upon shewing it, obtained a confirmation of it from King Edw. 3. and an allowance of it in *Banco Regis*. And for this offence the said Abbot was called before the King and his council, viz. in the Star-chamber; where the Abbot charged one Robert Rigg his Com-Monk, with the rasure: and the Abbot was convicted, (which could not be but in court.) And it was part of the sentence, that the said charter, confirmation, and allowance of it should be brought in by the Abbot to be cancelled. Out of which record, I do observe five things.

1. The antiquity of the Star-chamber, and this then was a court in which the Abbot was convicted, and sentence given. See 4 Inst. 10.

2. That the said rasure was not any counterfeit of the great seal; for if the offence had been high treason, it should not have been determined before the council of the King in the Star-chamber.

3. That spiritual persons were then punishable for offences before temporal Judges.

4. That if there be rasure of a deed between subject and subject, in a place material, all the deed becomes naught: and the party may plead to it *non est factum*. So, if the patentee rase his letters patent in any place material, all the patent becomes of no force by the law, as appears by the said sentence; and all the patent and all the dependance upon it, viz. the confirmation and allowance of it should be all cancelled and defaced.

C 2

5. That

5. That although that it is commonly said, that an Abbot can do nothing in prejudice of his house, yet in this case he may do it, for the King ought not to be in worse case than a subject: and if the Abbot had rased a charter made to him by a subject, in such a manner as he had rased the charter of the King, the deed of the subject had become of no force: and so in case of the King. And then I concluded, that if the rasing of a word in the patent of the King be not treason, the rasing of two or three, or all the words of the patent, and writing a new grant, is not treason: and I recited another precedent *in anno R. 2.* in Parliament, where the case was, that the Ambassador of the Duke and State of Genoa being here under the safe-conduct of the King, for the business of the King and the realm, was murdered by certain subjects of the King: and this matter was debated in Parliament, and there resolved, declared, and decreed, that this was treason. Note it well, this case was not referred to the Judges, but declared in and by Parliament: for it is provided by the said act of 25 E. 3. that for this that many other cases of like treason might happen in time to come, which men cannot think nor declare at present, that if another case, supposed treason, and which is not specified in the act, shall come before any of the Justices, the said Justices shall stay without going to judgment of treason, until the case be * shewn before the King in Parliament, who ought to adjudge it treason or other felony; in which branch two things are to be observed.

1. That although a case happen like to the cases of treasons mentioned in the said act, that the Judges ought not (as they do in other cases by equal and like reason) adjudge it to be treason, for that branch restrains them: but this ought to be declared in Parliament, for the words of the act are, "forasmuch as many other cases of treason," like, &c. The second thing is, that when a particular case (as the said case of an Ambassador of a King) was adjudged high treason, *et legatos violare contra jus gentium est*: and it appears 2 Reg. cap. 10. *Hamon Rex Amonitarum legatos Davidis contumeliis, &c. super quo accerimum bellum movetur, &c.* By which it appears the consequence of an abuse of an Ambassador, &c. *Quod talis injuria est justii belli causa.* Note, that *legatus ejus vice fungitur, a quo destinatur; et honorandus est, sicut ille cujus vicem gerit.* And afterwards George Leak, upon examination before the Chief Justice of England, made a clear confession of all the manner and circumstances of the fact: and upon examination, the case (as it was delivered to the Justices to consider of it, and to give their opinions)

was

See 3 Inst. 8.
John Imperial's
case.

To kill an Am-
bassador, trea-
son.

3 Inst. 8.

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Vide Grotium
de Jure Belli.
lib. 2. c. 18.

Part XII. Case of TREASON.

was such ; George Leak joined two blank parchments fit for letters patent, so close together with mouth glue as they were taken for one, and did put one label through them both ; then upon the uppermost he writ a true patent and got the great seal put to the label, so the label and seal were annexed to both the parchments, the one written, and the other blank, then he cut off the glewed skirts round about, and took off the uppermost thin parchment (which was written, and was a perfect patent) from the label which with the great seal did still hang to the blank parchment ; and then he writ another patent within the blank parchment, and did publish it as a good patent : hereupon two questions were moved.

1. Whether this offence be high treason or no ?

2. If it be high treason, then whether he may be indicted generally for the counterfeiting of the great seal, or else the special fact must be expressed ? and the Justices were divided in opinion in the first point of the case : and myself and divers others held that this act was neither high treason nor petit treason, because it is not within either of the branches of the said statute of 25 Ed. 3. But it is a very great misprision ; and the party delinquent liveth at this day. But the Chief Justice and divers others were against us ; and by reason of the diversity of opinions, *respectuatur*. *Vide Fleta, lib. 1. cap. 22. Item crimen falsi dicitur, cum quis illicitus cui non fuerit hæc data auctoritas de sigillo Regis rapto vel invento & brevia cartarum confignaverit.* As to the second point it was resolved, that if the special matter had amounted to counterfeiting the great seal in law within the said statute, then he might have been generally indicted of high treason for counterfeiting the great seal : as if a man in an affray kills a constable that comes to keep the King's peace without any express malice prepensed, this is murder in law ; and the delinquent may be generally indicted of murder by malice prepensed.

25 H. 8. c. 12.

A Case of CUSTOM:

Hil. 24 Eliz. In the Exchequer.

Customs, Post.
33, 34. See the
case of Reniger,
&c. Plow. 5, 6,
7, &c.

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Qr. 20 R. 2. c. 4.

A Merchant brought eighty weights of bay-salt by sea, to a haven in England, and out of the ship sold twenty weights, and discharged them to another ship in which they were transported: but the said twenty weights were never actually put on shore: and for the residue, viz. 60, he agreed for the custom, and put them upon land: and now the doubt was, upon the words of the statute of 1 El. cap. 11. * concerning exportation, viz. sent from the wharf, key, or other place on the land, and concerning importation, take up discharge, and lay on land: if in this case the said twenty weights which always were water-borne, and never touched the land, ought to pay custom as well inwards as outwards.

And it was resolved, that in both the cases custom ought to be paid; for the discharging out of the ship upon the sale aforesaid, amounts in law to a putting them upon the land, for in the law this is *infra corpus comitatûs*: and if the law shall not be so taken, the King may be defrauded of all his custom, and in this case, forasmuch as no custom was paid, it was resolved that the goods were forfeited, &c.

Case of NON OBSTANTE, or Dispensing Power.

Prerogative of
dispensing
power.

7 Co. 36, 37.

8 Co. 38.

Vaugh. 333,

347.

Cumberb. 22,
23.

* 11 Co. 82.

Plow. 457, 508.

§ Salk. 168.

See Skin. 157.

† Q. de hoc.

NOTE; a good diversity when the King shall be bound by act of Parliament, so that he cannot dispense with it by any clause of *Non obstante*. No act can bind the King from any prerogative which is sole and inseparable to his person, but that he may dispense with it by a *Non obstante*; as a sovereign power to command any of his subjects to * serve him for the public weal: and this solely and inseparably is annexed to his person: and this royal power cannot be restrained by any act of Parliament, † neither in *thesi*, nor in *hypothesi*, but that the King by his royal prerogative may dispense with it; for upon commandment of the King,

Part XII. Case of NON OBSTANTE.

King and obedience of the subject, doth his government consist: as it is provided by the statute of 23 H. 6. cap. 8 that ^{3 Inst. 239.} all patents made or to be made of any office of a Sheriff, &c. for term of years, for life, in fee-simple, or in tail, are void and of no effect, any clause or parol *De non obstante*, put, or to be put into such patents to be made, notwithstanding. And further, whosoever shall take upon him or them to accept or occupy such office of Sheriff by virtue of such grants or patents, shall stand perpetually disabled to be or bear the office of Sheriff within any county of England by the same authority: and notwithstanding that by this act. 1. The patent is made void. 2. The King is restrained to grant *Non obstante*. 3. The grantee disabled to take the office, yet the King by his royal sovereign power of commanding, may command by his patent, (for such causes as he in his wisdom doth think meet and profitable for himself and the commonwealth, of which he himself is solely Judge) to serve him and the weal public, as Sheriff of such a county for year, or for life, &c. And so was it resolved by all the Justices of England, in the Exchequer-chamber, 2 H. 7. 66. And so the royal power to pardon treasons, murders, rapes, &c. is a prerogative incident solely and inseparably to the person of the King: and for this *Non obstante* an act of Parliament to make the pardon of the K. void, and restrain the K. to dispense with this by *Non obstante*, and to disable him to whom the pardon is made, to take or plead it, shall not bind the King but that he may dispense with it: and this is well proved by the act of 13 R. 2. Parliament 2. cap. 1. For by this it was enacted, that no charter of pardon, from henceforth be allowed by whatsoever Justices, for murders, treason, rape of a woman, not specified in the said charter; and if it be otherwise, be the charter disallowed.

Note; this mischievous resolution was the ground of K. J. 2. patents to popish officers?

Vid. Post. 30. & Quere.

Pardons.

Note; this was the surest way that the Parliament could take to restrain the King to pardon murder, unless that he pardon it by express terms, which they thought the King would not, for they knew that the King could not be restrained by any act to make a pardon; for mercy and power to pardon is a prerogative incident, solely and inseparably to the person of the King: and it hath oftentimes been adjudged that the King can pardon murder by general words without any express mention, with *Non obstante* the said statute: see 4 H. 4. cap. 31. In which it is ordained that no Welshman be Justice, *Chamberlain, Treasurer, Page [19] Sheriff, Steward, Constable of a castle, Escheator, Coroner, or chief Forester, nor other officer whatsoever, nor

Case of NON OBSTANTE. Part XII.

Keeper of Records, &c. in any part of Wales, notwithstanding any patent made to the contrary, with clause of *Non obstante licet sit Wallicus natus*: and yet without question, the King may grant this with a *Non obstante*. So purveyance for the King and his household is incident solely and inseparably to the person of the King: and for this cause the act of Parliament held in time of H. 3. *De tallagio non concedendo*, tit. Purveyance, in Rastall, which bars the King wholly of purveyance, is void, as it appears in Co. lib. fol. 69. But in all such cases, although that the King may dispense with statutes, yet a general dispensation or grant without *Non obstante* is void: but in things which are not incident solely and inseparably to the person of the King, but belong to every subject, and may be severed, there an act of Parliament may absolutely bind the King: as if an act of Parliament do disable any subjects of the King, to take any land of his grant, or any of his subjects (as Bishops) (as it is done by the statute 1 Jac. c. 3.) to grant to the King, this is good; for to grant or take lands or tenements, is common to every subject: and for this it is not *proprium quarto modo*, to Kings, *scilicet omni soli & semper*. *Vide* the case of Deans and Chapters upon the statute of 13 Eliz. *vide* 8 R. 2. cap. 2. & 33 H. 6. that none shall be Justice of assise, &c. in the county where he was born or did inhabit, and yet the King with special *Non obstante* may dispense with this, for this belongs to the inseparable prerogative of the King, *viz.* his power of commandment to serve, &c.

Notes

Stat. 8 R. 2. c. 2.
& 33 H. 8. c. 24.
Cumb. 23.

[Note; these opinions may justify any King's acting against law, and are a proper ground to erect arbitrary power, &c.]

Q. IF

Q. If High Commissioners have Power to imprison.

Hil. 4 Jac. Regis.

NOTE; *Mich. 4 Jac. post prandium*, there was moved a question amongst the Judges and Serjeants at Serjeant's Inn, if the High Commissioners in ecclesiastical causes, may by force of their commission imprison any man or no?

First of all it was resolved, by all, that before the statute of 1 El. cap. 1. the King might have granted a commission to hear and determine ecclesiastical causes: but then notwithstanding any clause in their commission, the Commissioners ought to proceed according to the ecclesiastical law allowed within this realm, for he cannot alter neither his temporal * nor his ecclesiastical laws within this Realm by his grant or commission: *vide* Caudrey's case, Fifth Report. And they could not in any case have punished any delinquent by fine or imprisonment unless they had authority so to do by act of Parliament. Then all the question rests upon the act of 1 El. which as to this purpose rests upon three branches.

1. Such Commissioners have power to exercise, use, occupy, execute all jurisdiction spiritual and ecclesiastical.

2. Such Commissioners by force of letters patent have power to visit, reform, &c. all heresies, &c. which by any manner of spiritual or ecclesiastical power, &c. can, or lawfully may be reformed, &c. so that these branches limit the jurisdiction, and what offences shall be within the jurisdiction of such Commissioners, by force of letters patent of the King: and this is all, and only such offences may lawfully be reformed by the ecclesiastical law.

3. The third branch is, that such Commissioners after such Commission delivered to them so authorised, shall have power and lawful authority by * virtue of this act, and the said letters patent, to exercise, use, and execute all the premises according to the tenor and effect of the said letters patent. This branch gives them power to execute their commission. But it was objected, that this branch

High Commissioners, if they have power to imprison.

Post. 47, 76, 88.

13 Co. 9, 47. Nota.

Post. 74, 75.

* Ergo, Q. the opinions in the preceding case?

If High Commissioners have Power, &c. Part XII.

branch doth not give the Queen power, by her letters patent, to alter the proceedings of the ecclesiastical law, or gave to the Queen absolute power by her letters patent, to prescribe what manner of proceedings, or punishment concerning the lands, goods, or bodies of the subject; and this appears by the title of the act restoring to the crown the ancient jurisdiction, so that the intent was to make restitution, and not any innovation in the proceeding or punishment: and it was observed that this last branch gave to them power to execute all the premises, according to the tenor and effect of the said letters patent, so that these words, "so authorised" in the said letters patent, have relation only to the authority of the letters patent, before specified; viz. such as gave to them power to visit, reform, redress, order, correct, and amend all errors, heresies, schisms, abuses, contempts, and enormities whatsoever; which by any manner of spiritual or ecclesiastical power, can or may lawfully be reformed, &c. These are the tenor and effect of the letters patent before remembered: and if any other construction shall be made;

1. It shall be against the express letters, *scilicet*, said letters patent.

2. It shall be full of great peril and inconvenience, for then not only imprisonment of body, but confiscation of lands, goods, &c. And some corporal punishment may be imposed, for heresy, schism, incontinence, &c. Also power may be given to them to burn any man for heresy; which would be against the common law of the land.

Heresy, &c.
Post. 56.

See Simpson's case in Hil. the forty-second of Eliz. now reported by my Lord Coke in 4 Inst. 333. See Dyer 389.

[*Vide* post. 56, 58, and 93. of the writ *De heretico comburendo*.]

Of Stealing WOMEN.

NOTE; the statute of 3 H. 7. cap. 12. stands upon a preamble and a purview; the preamble is, where women, as well maids as widows, and wives having substance, &c. and some being heirs apparent, &c. for the lucre of such substance, be oftentimes taken by misdoers, contrary to their wills, and after married, &c. or defiled: so note these three words in the preamble: *viz.*

1. Be taken.
2. Be married.
3. Be defiled.

The purview is, that what person or persons from henceforth that taketh any woman so against her will unlawfully, *viz.* maid, wife, or widow, that such taking, procuring, and abetting to the same, and also receiving the said woman so taken against her will, and knowing the same be felony. And that such misdoers, takers, and procurers to the same, and receivers, knowing the said offence in form aforesaid, be henceforth reputed and judged as principal felons, so that it is not said in the purview so taken, married, or defiled, but only so taken against their will: and upon this, great question was moved 4 & 5 Ph. & Mar. in the Star-chamber, if the eloinment against her will, without marriage, or carnal copulation (which is intended by this word *defiled*) be felony or no? And the opinion of Brook and some other of the justices was, that it was * felony; but Sanders Chief Justice was against it; and afterwards, as Periam Chief Baron did report, it was resolved by the Justices in the 26 Eliz. that such eloinment only is not felony by the intent of the statute, without marriage or carnal copulation, for the mischief was not only the taking, but the marriage, or the defiling, which was (as it was said in the preamble) to the disparagement of the said woman, and utter heaviness and discomfort of her friends: and the purview ought to pursue the mischief.

Secondly, This word *so*, hath reference to the preamble, and all the mischief contained in it.

Note; by the express purview of the act, the accessory both before and after is made principal, &c. but by a construction of the common law they that receive the misdoers, and not the women are accessories; for this act makes even the receivers of the women principals.

Stealing women,
felony.
Post. 100.
Vide State
Trials, vol. 5.
2 Inst. 434, 435.
1 Hawk. 109,
110.
2 Hawk. 313.
Fares'. 101, 102
132.

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Pol. 100.

Aurum

Aurum Regina, Quid? &c.

Pasch. 4 Jac. Regis.

Aurum Reginae.
2 Roll. Abr. 213.
Maddox's Fir-
ma Burgi pa.
and his Hist. of
the Excheq.

Popham
was Ch. J.
of B. R. X

See also *Ann.*
Aur. Regis.
in *R. A. 126. 127.*
There are in
some remark
on this case.

X Fleming was
Ch. Baron, &
Coke was Ch. J.
of C. B. B. Probably
Resolution.
The reference
was to the three,
H. H.

NOTE; by the commandment of the King, it was re-ferred to Popham, Chief Baron, and myself, what right the Queen which now is, hath, and in what cases, to a right claimed by her, called *Aurum Reginae*, that is to say, *pro centum marcis argenti una marca auri solvend' per illum qui sponte se obligat*: and upon consideration had of it by a long time and view of all the records and precedents, viz. *Librum Rubrum* in *Scaccario*, fol. 56. *de Auro Reginae*, where it is said, that this is to be taken *de iis qui sponte se obligant Regi, &c.* which is the foundation of this claim; and of a record in the Tower, 52 H. 3. and of a Record in the Exchequer, 4 E. 1. and of a record in the Exchequer, Hil. 12 Ed. 3. and of the Tower in the same year, in *Rot. Claus.* and the acts of Parliam-ent 15 Ed. 3. cap. 6. & 31 Ed. 3. cap. 13. and the 13 R. 2. in *Turri*, and divers other precedents and process out of the Exchequer in the time of R. 2. H. 4. and other Kings, until the time of H. 7.

It was resolved that the Queen hath right to it, but with these limitations.

1. That it ought to be *sponte* by the subject *sine coactione*, so that this ought to be at the pleasure of the subject, whether he will offer, or give, or no: and for this all fines upon judg-ment, or by offer or fine for alienation, or in any other case where the subject doth not do it *sponte sine aliqua coactione*, viz. that the King of right ought to have it, there the Queen shall have nothing.

2. It ought to be *sponte sine consideratione alicujus reventionis seu interesse*, that the King hath *in esse, in jure coronæ*: and for this upon sale or demise of his lands, or wards, or goods of felons, outlaws, *et simili casu*; for these are contracts and bargains concerning the revenues and interests of the K. and it cannot be said in such case that the subjects *sponte se obligant*, as to purchase

or

Part XII. Aurum Reginæ.

or buying any the revenues or interests which the King hath.

3. It ought to be *sponte super considerationem, et non ex mera gratia & benevolentia subditi*, for that which is of mere grace is not properly said of obligation or duty, and the words of the records are, to have *de iis qui sponte se obligant*; and so was it ordained by the King and his Council, as appears by the record of Hil. 4 E. 1. in *Scaccario*, &c.

4. It ought to be *sponte super considerationem quæ non attingat reversionem seu interesse coronæ*, in any thing which the King hath: as if the * subject give to the King *sponte* a sum Page [22] of money for licence in mortmain, or for to create a tenure of himself, to have a fair, market, park, chase, or warren, within his manor, there the Queen shall have it: for the subject did this *sponte*, and was not constrained to it: and this doth not concern any revenue or interest of the King: but if the King hath a fair or market, or park, or warren, and grant it for a sum of money, there the Queen shall have nothing; for this was a thing *in esse*; and parcel of the revenue of the crown: and by that it appears, that forasmuch as little or nothing is given in such case, where this of right is due, this is not now of any such value as was pretended: and this resolution was reported to our sovereign lord the King by Popham, in the gallery at Whitehall.

Case of F O R E S T S.

Pasch. 5 Jacobi Regis.

Forests, chases.
 3 Inst. 76, 77.
 4 Inst. 289,
 313, to 319.

IN this same term it was informed to the King, that great wrongs were done in his forest of Leicester in the county of Leicester: and in his forest of Bowland in the county of Warwick, &c. parcel of his duchy of Lancaster: and upon this, by warrant of the King under his signet, all the Justices were assembled to resolve certain questions, to be moved concerning the forests by the Attorney of the duchy, and the counsel of the other part, which were forests, and which were chases; the which being matter in fact, the Judges could not give their resolutions but by way of direction: and it was resolved by them, that if these are forests, it will appear by matter of record, as by Eyres of Justices of forests, swannymotes, officers of forests, as Regardors, Agisters, Verderors, &c. But the appellation of it by the name of a forest in grants, offices, and conveyances, is not any proof that this is a forest in law.

4 Inst. 299, 300.

2. It was resolved by all the Justices, that if these are not other than free chases, and no forests in law, then he who hath any freehold within them, may cut his timber and wood growing upon it, without any view or licence of any: but if he cut so much, that there is not sufficient for covert, and to maintain the game of the King, he shall be punished at the suit of the King. And so if a common person hath chase in another's soil, the owner of the soil cannot destroy all the covert, but ought to leave sufficient covert and sufficient brouse-wood, as hath been accustomed.

3. It was resolved, that within such a chase the owner of the soil by prescription may have common for his sheep, and warren for his conies, by grant or prescription: but he cannot sur-charge with more than hath

Part XII.

Case of FORESTS.

hath been used, time from which, &c. nor make burrows in other places than hath been used from the time of which, &c. unless he hath warren by grant, and then he may use it according to his grant; but he cannot erect a new warren without charter.

4. It was resolved, that he who hath such a warren may lawfully build upon his inheritance, within his warren, a convenient lodge for preservation of his game.

5. It was said by Popham Chief Justice, that it was adjudged in the time of the Chief Baron Brett, in the Exchequer, that a man may prescribe to cut his wood upon his own inheritance within a forest, although it was against the act in the 43 Ed. 1. which is in the Abridgment, title * Forest 21.

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And this was the case of Sellenger, for cutting wood in the forest of Hay in the county of Hereford: and their reason was for that this was but a declaration of the common law, and it may be tolled by custom, as Littleton said; *vide* 2 Ed. 2. title Trespafs, fol. 9. in the time of Ed. 1. Trespafs 239. Plowd. Com. Dyer 72. 332. 2 Ed. 4. cap. 7. that the subject may have a forest: but this is intended if he hath power to have swannymotes and Justices in Eyre and Foresters appendant to his forests.

4 Inst. 31, 43, 15.
lb. 289, 290.

Consuetudo ex rationabili causa usitata privat communem legem: and it was held by some that this was but an ordinance, and not any act of Parliament. Q.

FLOYD and BARKER.

Pasch. 5 Jacobi Regis.

In the Star-Chamber.

Conspiracy doth
not lie against a
juror or indictor,
but against a
witness.
Vide Post. 32,
91, 92, 99, &c.
1 Hawk. ch. 72.
per totum.

IN this very term, between Rice ap Evan ap Floyd, and Richard Barker, one of the Justices of the grand sessions in the county of Anglesey, and other defendants : it was resolved by Popham and Coke Chief Justices, the Chief Baron, and Egerton Lord Chancellor, and all the Court of Star-chamber, that when a grand inquest indicts one of murder or felony, and after the party is acquitted, yet no conspiracy lies for him who is acquitted, against the indictors, for this that they are returned by the Sheriff by process of law to make inquiry of offences upon their oath, and it is for the service of the King and the commonwealth. And as it is said in the 10 El. 265. they are compellable to serve the law, and the court : and their indictment or verdict is matter of record, and called *Verdictum*, and shall not be avoided by surmise or supposal, and no attain lies. And for this reason they shall not be impeached, for any conspiracy or practice, before the indictment : for the law will not suppose any unindifferent, when he is sworn to serve the King : and with this agrees the books in 22 Aff. 77. Affise p. 12. 21 Ed. 3. 17. 16 H. 6. 19. 47 Ed. 3. 17. 27 H. 8. 2. F. N. B. 115. a. But it is otherwise of a witness ; for if he conspire out of the court, and after swear in the court, his oath shall not excuse his conspiracy before ; for he is a private person, produced by the party, and not returned by the Sheriff, who is an officer sworn, and the jurors are sworn in court as indifferent persons : and the law presumes, that every juror will be indifferent when he is sworn ; nor will the law admit proof against this presumption.

2. It was resolved, that when the party indicted is convicted of felony by another jury, upon "not guilty pleaded," there he never shall have a writ of conspiracy, but when the party upon his arraignment is *legitimo modo acquietatus* : but in the case at the bar, the grand jury who indicted one William Price for the murder of Hugh ap William, the jury, who, upon not guilty pleaded, convicted him,

Part XII. Case of Conspiracy.

him, were charged in the Star-chamber for conspiracy against him, and indicted and convicted, which manner of complaint was never seen before: for if the party shall not have a conspiracy against the indictors, when the prisoner is acquitted upon his indictment, *a multo fortiori* when he is lawfully convicted, he shall not charge neither the grand inquest by whom he was indicted, nor the jury who found him guilty: for the law in such case doth not give any attain, for this that he was indicted by the oath of twelve men at the least, and found guilty by twelve: and in these cases, the King is the sole party to the proceedings against the prisoner: but on the other side, when a jury hath acquitted a felon or traitor against manifest proof, there they * may be charged in the Star-chamber, for their partiality in finding a manifest offender not guilty, *ne maleficia remanerent impunita*. And it will be a cause of infinite vexation and occasion of perjury and smothering of great offences, if such averments and supposals shall be admitted after ordinary and judicial proceeding: and it will be a means *ad deterrendos & detrahendos juratores a servitio Regis*. Page [24]

3. It was resolved that the said Barker who was Judge of assise, and gave judgment upon the verdict of death, against the said W. P. and the Sheriff who did execute him according to the said judgment, nor the Justices of peace who did examine the offender, and the witnesses for proof of the murder before the judgment, were not to be drawn in question in the Star-chamber, for any conspiracy, nor any witness, nor any other person ought to be charged with any conspiracy in the Star-chamber, or elsewhere, when the party indicted is convicted or attain of murder or felony: and although the offender upon the indictment be acquitted, yet the Judge, be he Judge of assise, or a Justice of Peace, or any other Judge, being Judge by commission and of record, and sworn to do justice, cannot be charged for conspiracy, for that which he did openly in court as Judge or Justice of Peace: and the law will not admit any proof against this vehement and violent presumption of law, that a Justice sworn to do justice will do injustice; but if he hath conspired before out of court, this is extrajudicial; but due examination of causes out of court, and inquiring by testimony, *& similia*, is not any conspiracy, for this he ought to do; but subornation of witnesses, and false and malicious prosecutions, out of court, to such whom he knows will be indictors, to find any guilty, &c. amounts to an unlawful conspiracy.

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And

Averments.

Note.

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And records are of so high a nature, that for their sublimity they import verity in themselves; and none shall be received to aver any thing against the record itself; and in this point the law is founded upon great reason, for if the judicial matters of record should be drawn in question, by partial and sinister supposals and averments of offenders, or any on their behalf, there will never be an end of causes: but controversies will be infinite; *et infinitum in jure reprobatur*: and for this it is adjudged in the 47 Ed. 3. 15. that a Judge who hath a commission, *viz.* that is of record, shall not be charged in conspiracy; which is to be understood of what he did in court, for the reasons and causes aforesaid: and with this agree the books, 21 Ed. 4. 67. & 27 Ass. pl. 12. and the reason is for this, that though the party is acquitted, yet the accusing stands with the record: and accordingly was the law taken in this case. But in an hundred-court, or other court which is not of record, there averment may be taken against their proceedings, for that it is no other than matter *in pais*, and not of record; as it appears in the 47 Ed. 3. 15. Also one shall never assign for error, against that which the court doth as Judges; as to say, that the jury gave verdict for the defendant, and the court did enter it for the plaintiff, or to say that the party who levied the fine was dead before the fine was levied, or such like. *Vide* 1 H. 6. 4. 39 H. 6. 52. 7 H. 7. 11 H. 7. 4. 28. 1 Mar. Dyer 89. But in a writ of false judgment, the plaintiff shall have a direct averment against that which the Judges in the inferior court, have done as Judges, *quia recordum non habent*, and with this accords 21 H. 6. 34. And as a Judge shall not be drawn in question in the cases aforesaid, at the suit of the parties, no more shall he be charged in the said cases before any other Judge at the suit of the King. And for this in the 27 Ass. pl. 18. one was indicted and arraigned at the suit of the King, that as he was a Justice of *oyer and terminer*, where certain persons were indicted * of trespass before him, he made an entry of record, that they were indicted of felony: and it was adjudged that this indictment was against the law, for this that he was a Justice by commission; and that is of record; and this present act shall be to defeat the record, *hoc est*, to aver against that which he did as Judge of record, which cannot be by the law. *Vide* 27 Ass. pl. 23. 2 R. 3. 9. 28 Ass. pl. 21. 9 H. 6. 60. And it was said, that it was the case of one Nudigate, who as a Just. of Peace had recorded a force upon a view, which he did as Judge upon

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on record ; and a bill was exhibited against him in this court, for this, that he had falsly made a record, where indeed there was not any force: and by the opinion of Catlyn and Dyer, Chief Justices, it was resolved, that that thing, that a Judge doth as Judge of record, ought not to be drawn in question in this court.

Note well, that the said matters done at the bar were not examinable in the Star-chamber ; and for this it was ordered and decreed by all the court, that the said bill without any answer to it, by the said R. Barker, shall be taken off the file and cancelled, and utterly defaced: and it was agreed, that inso-much as the Judges of the realm have the administration of justice, under the King, to all his subjects, they ought not to be drawn into question for any supposed corruption, which extends to the annihilating of a record, or of any judicial proceedings before them, or tending to the slander of the justice of the King, which will trench to the scandal of the King himself, except it be before the King himself; for they are only to make an account to God and the King,* and not to answer to any suggestion in the Star-chamber ; for this would tend to the scandal and subversion of all justice. And those who are the most sincere, would not be free from continual calumniation, for which reason the orator said well, *invigilandum est semper, multæ insidiæ sunt bonis.*

And the reason and cause why a Judge, for any thing done by him as Judge, by the authority which the King hath committed to him, and as sitting in the seat of the King (concerning his justice) shall not be drawn in question before any other Judge, for any surmise of corruption, except before the King himself, is for this ; the King himself is *de jure* to deliver justice to all his subjects ; and for this, that he himself cannot do it to all persons, he delegates his power to his Judges, who have the custody and guard of the King's oath.

And forasmuch as this concerns the honour and conscience of the King, there is great reason that the King himself shall take account of it, and no other.

And Thorp's judgment, who was drawn in question for corruption before commissioners, was held against the law, and upon that he was pardoned ; and it is contained in the same record, *quod non trahitur in exemplum.* Vide the conclusion of the oath of a Judge. Vide the Chronicle of Stow, 18 Edw. 3. 312.

Note ; Thomas Weyland Chief Justice of the Common Bench, Sir Ralph Hengham Justice of the King's Bench ; and the other Justices were accused of bribery and cor-

* Q. the Par-
liament.

Judges have
custody of the
King's oath.

See 4 Inst. 41,
43, 71.

See Cotton's
Records 74, 316.
That Thorp's
judgment was by
Parliament ad-
judged just and
legal, but in
truth the whole
set of Judges
were then so
corrupt that the
K. was forced to
try him by com-
mission.

ruption, and their causes were determined in Parliament, where some were banished, and some were fined and imprisoned.

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Vide 2 Ed. 3. fol. 27. That the Justices of Trayl-baston (so called for their summary proceeding) were in a manner Justices in Eyre; and their authority was founded upon the stat. of Ragman, which you may see in the old *Magna Charta*. *Vide* the form of the commission of the * Trayl-baston, Hollingshead, Chron. fol. 312. And note; it appears by the said precedent and Chronicle, that the King did examine the corruption of his Judges, before himself in the Parliament, and not by force of any commission.

Absurdum est affirmare, (re judicata) credendum esse non judici.

Of Oaths before an Ecclesiastical Judge EX OFFICIO.

The Ordinary cannot enforce a man to answer general articles Ex officio.

Note, this Ex Officio oath is since abrogated by stat. 16 Car. 1. c. 2. sect. 4. & 13 Car. 2. c. 12. sect. 4. See Gibson's Codex 56, 58, 407, 999, 1053.

NOTE; *Pasch. 4 Jacobi*, in the time of the Parliament, the Lords of the Council of Whitehall demanded of Popham Chief Justice and myself, upon motion made by the Commons in Parliament, in what cases the Ordinary may examine any person *ex officio* upon oath; and upon good consideration and view of our books, we answered to the Lords of the Council at another day in the Council-chamber.

“ 1. That the Ordinary cannot constrain any man ecclesiastical or temporal, to swear generally to answer to such interrogatories as shall be administered unto him; but ought to deliver to him the articles upon which he is to be examined, to the intent that he may know whether he ought by the law to answer to them: and so is the course of the Star-chamber and Chancery; the defendant hath the copy of the bill delivered unto him, or otherwise he need not to answer to it.

“ 2. No man ecclesiastical or temporal shall be examined upon secret thoughts of his heart, or of his secret opinion: but something ought to be objected against him what he hath spoken or done: no lay-man may be examined *ex officio*, except in two causes, and that was grounded upon great reason; for lay-men for the most part are not lettered, wherefore they may easily be inveigled and entrapped, and principally in heresy and errors.

“ rors of faith : and this appears by an ordinance made in
 “ the time of Ed. 1. tit. Prohibition in Rastal.”

The words of which ordinance are, and *quod non permit-
 tant quod aliqui laici in ballivâ suâ in aliquibus locis conveniantur,
 ad aliquas recognitiones per juramenta sua faciendas, nisi in causis
 matrimonialibus et testamentariis.* And the reason that the ec-
 clestiaſtical Judge shall examine them in these two cases, is for
 this, that contracts of matrimony, and the estates of the
 dead are many times secret ; and they do not concern the
 shame and infamy of the party, as adultery, incontinen-
 cy, usury, simony, hearing of mass, heresy, &c.

And for this cause in these cases, and such like, the eccle-
 siastical Judge ought not to examine *partem ream*, upon their
 oath ; for as a civilian said, that this was *inventio diaboli ad de-
 trudendas miserorum animas ad infernum* : and in the Register,
 fol. 36. 6. there is a prohibition in this form, *Præcipimus tibi
 quod non permittas quod aliqui laici ad citationem talis Episcopi ali-
 quo loco conveniant de cætero ad aliquas recognitiones factas vel sa-
 cramenta præstanda*, (the one is the exposition of the other)
nisi in casibus matrimonialibus et testamentariis : and there is an
 attachment upon it, *pone per vadem talem Episcopi : quod sit coram
 Justiciariis nostris, &c. ostensurum quare fecit summoniri, et
 per censuras ecclesie distringi laicas personas vel laicos homines &
 fœminas ad comparendum coram eo ad præstandum juramentum
 pro voluntate sua ipsis invitis in grave coronæ præjudicium * &* Page [27]
*dignitatis nostræ Regiæ, necnon contra consuetudinem regni nostris
 et habeas ibi nomina plegiorum, &c. teste, &c.* by which it
 doth appear, that this was not only against the said ordinance,
 but also against the custom of the realm, which had been
 time out of mind, and also in prejudice of the crown and
 dignity of the King : and with this agrees F. N. B. fol. 41.
 And *vide* the case reported by the Lord Dyer (but the case is
 not printed) Trin. 10 Eliz. one Leigh an attorney of the
 Common Pleas, was committed to the Fleet by the high
 Commissioners in a cause ecclesiastical, for this, that he had
 been at mass, and refused to swear to certain articles to be
 proposed to him. And held, that although in such case, ec-
 clestiaſtical jurisdiction is saved by the statute of 10 Eliz. yet
 they ought not in such case to examine upon his oath : and
 hereupon he was delivered by all the court of Common Pleas
 upon the return of the matter upon a *Habeas corpus*.

Leigh's case.

And in Mich. 18 El. Dyer, fol. 175. in Hind's case, who
 would not swear *coram Commissionariis Ecclesie super articu-* Hind's case.

Note, the delivery out of prison was because the high commission had no power to imprison. See 2 Inst. 333. Gibbon's Codex, 410.

los pro usura, & ea de causâ commissus est gaolæ de le Fleet. He was delivered by *Habeas corpus per totam curiam*. This was also because they could not imprison.

Vide le statute 25 H. 8. cap. 14. which is declaratory as to this point: it standeth not with the right order of justice nor good equity, that any person should be convicted, and put to the loss of his life, good name, or goods, unless it were by due accusation, and witnesses, or by presentment, verdict, confession, or process of outlawry, &c. And it is not reasonable that any ordinary upon suspicion conceived of his own fancy, without due accusation or presentment, should put any subject of this realm in infamy and slander of heresy, to the peril of life, loss of good name, or goods; (*et paulo antea*) the most expert and learned man of this realm, diligently laying guard upon himself, cannot eschew and avoid penalty and danger, &c. if he should be examined upon such captious interrogatories, as is and hath been accustomed to be ministered by the Ordinaries of this realm, in case where they will suspect any man of heresy: and this was the judgment of all the said Parliament. See F. N. B. Justice of Peace 72. Lamb. in his Justice of Peace 338. Crompt. in Justice of Peace 36. 6. In all which it appears, that if any be compelled to answer upon his oath, where he ought not by the law, that this is oppression and punishable before a Justice of Peace, a Justice of Assize, &c. for this is an article of charge, to enquire of all oppressions: and as to that which was objected, that for a very long time, divers had been examined upon oath in ecclesiastical courts; as to this it was answered, that it might very well be, and not against law, for the words of the treatise or ordinance, and of the register, are, *contra voluntatem eorum, &c.* So that if any assent to it, and take it without exception, that is not *contra voluntatem eorum*, but to enforce any to take it, who ought not to take it by the law, is a great oppression: but if any person ecclesiastical be charged with any thing which is punishable by our law, as for usury, &c. there he shall not be examined upon oath, for this, that his oath is evidence against him at the common law, and to do it incurs the penalty of the statute; but witnesses may be cited to testify. Register, tit. Consult. F. N. B. 53. d. Also by the statute 2 H. 4. cap. 15. it is provided, that *dictus Dioecesanus per se vel per Commissarios suos contra hujusmodi personas, &c. Et ad omne juris effectum, publicè & judicialiter procedat & negotium hujusmodi, &c. terminet juxta*

Gibbon's Codex
400.

Part XII.

Oath Ex Officio.

juxta canonicas sanctiones, which words, *juxta canonicas sanctiones*, give them power to proceed according to their canons, and exclude the common law, and by pretext of this in the cases mentioned in the said act, they examined as well lay-people as * Clerks, upon their oaths concerning heresy, erroneous opinions, &c. mentioned in the said act in the reigns of H. 4. H. 5. H. 6. Ed. 4. R. 3. H. 7. unto the time of the said act of 25 H. 8. And for this in the reign of H. 8. nor in the reign of Ed. 6. no lay man was examined upon his oath, except in the said two cases of matrimony and wills: but in the reign of Queen Mary, this act of 2 H. 4. was revived, and then all the martyrs who were burnt were examined upon their oaths: and afterwards by the 10th Eliz. the said act of 2 H. 4. is repealed, by which the common law is in full force and effect: and for this cause all the pretence of possession and practice which the ecclesiastical courts have had is strongly answered by this which hath been said, that the words of the said treatise and register are, *contra voluntatem eorum*, &c. And those who have so taken it, have assented to it, and that stands with law.

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Post. 57, 58, 93.

Note, that King John after he had murdered his nephew Arthur, and niece Ellenor, the issue of his elder brother Geoffery, after he had lost Normandy, Aquitain, and Anjou, after that his Commons for unjust vexation disobeyed him, his nobles revolted from him, the clergy oppressed by him, and that he stood excommunicated by the Pope, and his kingdom interdicted, he for his protection, granted by his charter of 13 *Maii anno regni* 14. submitted himself to the obedience of the Pope: and after in the fourteenth year of his reign, as one destitute of all succour and safety, and from day to day in fear to lose his crown, by another charter he resigned his crown and realm to the Pope Innocent and his successors, by the hands of Pandolph his legate, and took it of him again to hold of the Pope, which was utterly void, for this, that the kingly dignity is an inherent inseparable to the royal blood of the King, and descendable to the next of blood of the King, and cannot be transferred to another, no more than a Duke, or Earl, or Baron, or other dignity may transfer over their dignity, for these are incidents inseparable; also the Pope was an alien born, and therefore was not capable of inheritance within England: by colour of which submission and resignation, the Pope and his successors exacted great sums of the clergy and laity of England, *pro commutandis*

Matth. Paris, 225, 226, 227, &c.

Parliament Cases, 1, 2, &c.

pœnitentiis, to maintain the height and dignity of the Pope. And for the better enriching of the coffers of the Pope, Pope Gregory the Ninth, sent *Otho Cardinalis de Carcere Tulliano* into this realm, when there was indignation betwixt H. 3. and his nobles, to collect money for the Pope, who did collect infinite sums of money, so that it was said of him, *quod legatus saginatur bonis Angliæ*, which legate held his council at London, *anno Domini* 1237, & 22 H. 3. And for the better finding out offences which should be redeemed with money, he, with the assent of the Bishops of England there assembled, made divers canons, amongst which one was, *Jus jurandi calumniæ in causis ecclesiasticis cujuslibet, et de veritate dicendi in spiritualibus quoque, ut veritas facilius aperiatur & causæ celerius determinentur, statuimus de cætero præstari in regno Angliæ secundum canonicas & legitimas sanctiones, obtenta in contrarium consuetudine non obstante, &c.*

By which canon it appears, that the law and custom of England was against this examination of the party defendant upon his oath, for it is said *statuimus de cætero præstari in regno Angliæ*, so that this was a new law, and took its effect *de cætero*.

2. *Obtenta in contrarium consuetudine non obstante.* And this very well agrees with the register and the said treatise *De Regia Prohibitione*, and the other authorities, that the law and custom of England * was, that lay people in criminal causes, be they ecclesiastical or temporal, shall not be examined upon their oath (only in causes matrimonial and testamentary;) otherwise it is of Clerks, as is aforesaid: and for this, that it appears by the said canon itself, that this was against the law and custom of England; whence it follows that this canon shall not bind, for that the law and customs of England cannot be changed without an act of Parliament, for this, that the law and custom of England is the inheritance of the subject, which he cannot be deprived of without his assent in Parliament: and it appears in Linwood, *cap. Jure jurandi, fol. 8. 6.* That Boniface Bishop of Canterbury, *anno* 1272. & 57 H. 3. a little before the death of that King made this canon, *Statuimus quod laici de subditorum peccatis et excessibus corrigendis per prælatos et judices ecclesiasticos inquiratur ad præstandum de veritate dicenda sacramentum per excommunicationis sententias. Si opus fuerit compellantur impediētes, vero ne hujusmodi juramentum præstetur per interdictum est excommunicatio sententia arceantur.* In which canon it is to be observed, that this extends

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See Gibson's
Codex 999.
& ibid. 407,
1080.

tends to lay people ; for, as appears, the ecclesiastical Judge may examine those of the clergy upon their oaths, and note, Linwood, *cap. Jure jurando*, fol. 6. *litera E.* saith so. *Hic dicitur causa editionis hujus statuti, viz. prælati ecclesiastici procedebant ad inquirendum de criminibus & excessibus subditorum suorum et laici (nota hic) suffulti potestate dominorum temporalium in hujusmodi inquisitionibus noluerunt jurare de veritate dicenda.*

Note well what the cause was, why lay people refused to be examined for crimes and excess.

2. It appears, that the Judges of the common law, by their prohibition did interdict, &c. as it appears by the register and the other authorities ; in the time of Ed. 1. and other Kings, incroachments were made upon the subjects, which are here called *impedimentes*, but now the canon saith *impellat*.

3. That where by the law they may examine lay people upon their oath, *in causis matrimonialibus et testamentariis*, here Boniface makes this canon to extend to *peccata et excessus*, which canon was utterly against the law and custom of England. In like manner another was made by him at the same time Linwood, *cap. De benef. fol. 231.* which canon being made directly against the Judges, who did award process against them, if they did impose any pecuniary pain : and prohibits them the Judges with fear of excommunication, the canon being against law, the Judges prohibited them notwithstanding this thundering of excommunication in all ages. And the scope and purpose of the said canon was to perplex the subjects, and to enrich themselves by punishment pecuniary : and this is declared by act of Parliament made 9 Ed. 2. called *Articuli Cleri*. *Si prælati imponant pœnam pecuniariam alicui pro peccato, &c. Regia prohibitio locum habet.* Note this. Note.

OF PARDONS.

Trin. 5 Jac. 1.

Action popular.
Bonum publicum.
Post. 63.
1 Salk. 32.
1 Inst. 56. a.

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Nota.
Bridges.
See 13 Co. 33.
&c. ib.
Antea 18, 19.

Antea 8. 49.

NOTA, the law so regards the weal public, that although in actions popular the King shall have the suit solely in his own name for the redress of it, yet by his pardon he cannot discharge the offender, for this, that it is not only in prejudice of the King but in damage of the subjects: though for the avoiding of infinite suits, they cannot have private actions, and for that reason the suit is given to the King; not only for himself, but also for all his subjects, * as if a man ought to repair a bridge, and for default of reparation it falls into decay: in this case the suit ought to be in the name of the King, and the King is sole party to the suit, but for the benefit of all his subjects. And for this, if the King pardon it, yet the offence remains; and in any suit in the name of the King, for redress of it, the offender ought (notwithstanding the pardon) to make and repair the bridge for the benefit of the weal public; but peradventure the pardon shall discharge the fine for the time past; and with this agrees 37 H. 6. 4. 6. Plow. Com. in Nicol's case, 487. where the words of the law are; if a bridge or a highway is repairable by the subject, and is in decay, the pardon of the King shall not excuse him which ought to do it, for this, that the other subjects of the King have interest in it: but note, the pardon in such case shall discharge the fine, but only for the time before the pardon: but for the time after the pardon, without question the offender for his default shall be fined and imprisoned; the same law, and *a multo fortiori* in case of depopulation; for this is not only an offence against the King, but against all the realm; for by this the realm is enfeebled; idle and dissolute people, which are enemies to the commonwealth, abound: and for this cause depopulation and diminution of subjects is a greater nuisance and offence to the weal public, than the hindrance of the subjects in their good and easy passage by any bridge or highway: and for this, notwithstanding the pardon of the King, he shall be bound to re-edify the houses of husbandry which he hath depopulated;

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pulated ; but peradventure for the time before the pardon he shall not be fined, but for the time after without doubt he shall be fined and imprisoned, for the offence itself cannot be pardoned, as in the case of a bridge or highway ; *quia est malum in se* : but this continues as to the fine and imprisonment at all times after the pardon : but the penalty inflicted by the statute that may be discharged, *quia prohibitum*. Vide 3 Ed. 3. tit. Aff. 443. where an Abbot was bound to repair a bridge by prescription, and after the King by his charter discharged him, which charter was allowed in a *Quo warranto* And after the Abbot was indicted at the suit of the King, for default of reparation of the said bridge, and he pleaded the said charter and allowance : and notwithstanding it was adjudged that he should repair the said bridge, for this, that it shall be to the prejudice and damage of his subjects : but when the King chargeth his subjects for the making of a bridge, or causey, or wall, &c. there the King may discharge of the pontage, murage, &c. But when one is bound by prescription or tenure, &c. to repair a bridge, &c. there the King cannot discharge it. And all this appears in the said book.

And note, if one be bound to the King in a recognizance for to keep the peace against one, and other the liege people of the King ; in this case the King, before the peace cannot pardon or release the recognizance, as it is agreed in 11 H. 4. 43. 37 H. 6. 4. 1 H. 7. 10. And the reason is, although the recognizance be made to the King solely, yet inasmuch as this is made for the benefit and safety of the subjects of the King, in such case it cannot be discharged.

Note, no licence can be made to do any thing that is *malum in se*, but *malum prohibitum* may. 11 H. 7. 11. 3. H. 7. 39 H. 6. 39.

Vide 35 H. 6.
29. per Fortescue & 16 Ed.
3 Grant 53.

See Vaug. 333,
342.
Post. 61.

Com-

Commissions of Enquiry.

*Trin. 5 Jac. 1.*Commissions in
English illegal.

NOTE, commissions in English under the great seal were directed to divers Commissioners within the counties of Bedford, Bucks, Huntingdon, Northampton, Leicester, and Warwick, to enquire of divers articles annexed to it: and the articles were also in English, to enquire of depopulation of houses, converting of arable land into pasture, &c. But the Commissioners should not have any power to hear and determine the said offences, but only to enquire of them: and by colour of the said commissions, the said Commissioners took many presentments in English, and did return them into the Chancery, and after, *scil. Trin. 5 Jac.* it was resolved by the two Chief Justices, and by Walmesley, Fenner, Yelverton, Williams, Snigg, Altham, and Foster, that the said commissions were against law for three causes:

1. For this, that they were in English.
 2. For that the offences enquirable were not certain within the commission itself, but in a schedule annexed to it.
 3. For this, that it was only to enquire, which is against law, for by this a man may be unjustly accused by perjury, and he shall not have any remedy.
 4. For this, that it is not within the statute of 5 Eliz. &c.
- Also the party may be defamed, and shall not have any traverse to it.

* Quere if not
treasure-trove
and felons goods.
Original of as-
sises and Nisi
prius.

- 1 Inst. 153. b.
- 2 Co. 80.
- 4 Co. 43.
- 7 Co. 12.
- 8 Co. 57.
- 10 Co. 53, 71,
- 103.
- 11 Co. 69.

Such a commission may be only to enquire of * treason, felony committed, &c. And no such commission ever was seen, to enquire only, (*i. e.* of crimes.)

At the common law, assises were not taken but before Justices in Eyre (who sat *virtute brevis*, every seventh year. *Vide* Britton, fo. 1. and Bracton, lib. 5 & 11.) or in the Common Pleas: and this being a great molestation and trouble to the recognitors of assise, which writ for the most part was in use, for the ease of the country, and expedition of Justice; it was provided by *Magna Charta*, cap. 12. *Quod recognitiones de nova disseisina, & de morte ancestor non capiuntur nisi in suis comitatibus, et hoc modo: nos, vel (si extra regnum fuerimus) Capitales Justiciarii nostri mit- tent Justiciarios nostros per unumquemque comitatum semel in anno, qui, &c. capiant in comitatibus illis assisas prædict.*

And

and after was the statute of Westminster 2. c. 30. made, and by this it is provided, *quod assignentur duo Justiciarii jurati, coram quibus et non aliis capiantur assise, &c. ad plus per annum.*

Judges, their authority, &c.

By which act Justices of *Nisi prius* were constituted of other pleas, as well of one Bench as the other, *Coram quibus Justiciariis & societate (viz) coram duobus Justiciariis vel coram uno & uno Milite, &c.* And by the same act the Justices of *Nisi prius* have power to give judgment, &c. in assises of darrein presentment, and *Quare impedit*; then came the statute of 21 Ed. 3. *De finibus, cap. 4.* and provided *quod inquisitiones & recognitiones capiantur tempore vacationis* generally before aliquo *Justiciario de utroque banco, coram quibus placitum deducit fuerit associat sibi, &c.* And after by the statute of York, cap. 3. it is provided, that in pleas of land the *Nisi prius* shall be taken before one of the Justices, where the plea, &c. and chapter 4. that no other pleas moved by attachment or distress shall be taken before any Justice, either of the one Bench or the other generally, be the plea before them or not, &c. by the statute of 14 Ed. 3. cap. 15. *Nisi prius* may be taken in any plea, real or personal before two, so that the one be a Justice of the one Bench, or a Chief Justice, or a Serjeant sworn.

* By the statute *De finibus, cap. 3. Justiciarii ad assisas capiendas assignati deliberant gaolas in comitatibus illis sive infra libertates quam extra de (omnibus) prisonariis quibuscunque, vide le recital del stat. of 28 Ed. 1. De appellatis*, which recites the statute *De feloniam, &c.* but note, that felony included trespass in ancient time. *Vide Stamf. 57.* The statute of 3 H. 3. cap. 7. gives power to Just. of Assise to hear and determine treason, concerning false money: the stat. of 14 H. 6. c. 1. provides that Justices of *Nisi prius* have power in all the cases of felony and treason to give their Judgment as well where the party is acquitted of the felony or treason, as where he is attaint, and to award execution, &c.

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The statute of 28 Ed. 1. *De appellatis* gives power to Justices of Assise to try the appeals of approvers.

Justices of Assise by the statute of 34 & 35 H. 8. cap. 14. may write to the Clerk of the Crown *De Banco Regis*, to certify the first conviction in their own names; but where Justices of one county or circuit write to other to certify the attainder of a principal, the best form is in the name of the King. 2 & 3 Ed. 6. cap. 24.

By the statute *De articulis super chartas, c. 10. & 4 Ed. 3. cap. 11. & 7 R. 2.* Justices of Assise may hear and determine conspiracies, false informations, and male-procurers of

5 Co. 2 Part 36.

8 Co. 118.

Antea 23, 24.

of inquests and juries to any plaint, without writ, and without delay, and of confederacies, and champerties, and maintainers, bearers, and alliances by bond, &c.

Q. stat. 4 E. 3.
cap. 2.
Sec 7. Co. 12.
9 Co. 118.
10 Co. 54.
11 Co. 62.

By the statute of Northampton, 2 Ed. 3. cap. 3. Justices of Assise have power to hear and determine the statute concerning armour; also to punish the Justices of Peace, and others, who have not done their office in such like cases, &c.

Justices of Assise ought twice in the year to proclaim the statute of 32 H. 8. and other statutes against unlawful maintenance, champerty, imbracery, and unlawful retainers.

By the 3 H. 7. cap. 1. Justices of Assise take bail of him who is acquit of murder within the year, to answer the appeal of the party.

By 33 Hen. 8. Justices of Assise cause the statute against unlawful games, to be proclaimed in their circuit.

Justices of Assise to make execution of the statute 13 H. 4. cap. 7. of riots made in their presence, upon pain of a hundred pounds, and by 2 H. 5. cap. 8. commission shall be awarded to enquire of a default of Justices of Assise and of the Peace.

Note.
27 H. 8. fo. 3

By the statute of Westm. 2. cap. 37. & 2 Ed. 3. cap. 5. Justices of Assise ought to enquire of return, or not return of Sheriffs.

Justices of Assise to enquire of all points of the statute of 23 H. 6. cap. 10. concerning Sheriffs, Under-sheriffs, and their Clerks, Coroners, Stewards of franchises, Bailiffs, and Guardians of prisons, for their extortion, and for delivering of them who are not bailable, and for detaining those who ought to be bailed, 2 *Mariae* Dyer 99. Justices of Assise may hold plea in appeal of murder, by W. 2 & 3 H. 7. and of robbery by commission for gaol delivery.

23 Ed. 3. cap. Justices of Assise may enquire of default, (of Justices of Peace, &c.) of punishment of victuallers, &c. who sell at unreasonable prices.

Justices of oyer
and terminer,
and gaol deli-
very. Sec 4 Co.
46, 47.
6 Co. 20.
9 Co. 12.
7 Co. 56, 118.
Page [33]

Note; Justices of *oyer* and *terminer* cannot by this authority enquire but of such, who are indicted before themselves, for their commission is, *Ad inquirendum, audiendum, & terminandum*: but Justices of gaol-delivery may arrain a prisoner indicted before others, the words of their commission are, *Ad gaolas, gaolam de B. de prisonaribus in ea existentibus hac vice deliberandum, secundum leges, &c.* Brook, tit. Commission, * 3 Mar. 24. 4 Ed. 3. c. 2. that Just. of gaol-delivery deliver prisoners indicted

Part XII. Customs, Subsidies, and Impositions.

dicted before the guardians of the peace. And by the statute of 1 Ed. 6. cap. 7. new commissioners of gaol-delivery; but this doth not extend to indictments or conviction before the Commissioners of *oyer and terminer*: and the reason of this, is for this, that the indictments and proceedings before Justices of *oyer and terminer*, after the *oyer* determined, ought to remain in the King's Bench: and the records before Justices of gaol-delivery remain with the *Custos rotulorum*. Vide Brook, tit. Commission 12. 38 Ed. 3. tit. *Oyer and Terminer*, 44 Ed. 2. 31.

Customs, Subsidies, and Impositions.

NOTE; upon conference between Popham, Chief Justice, and myself, upon a judgment given lately in the Exchequer, concerning the imposition of currants: and upon consideration of our books, and of the statutes to this purpose, it appeared to us, that the rule of the common law is in the register, title *Ad quod dampnum*, and F. N. B. 222. a *Quod patria magis solito non oneretur seu gravetur*. Also there is another rule, that the King may charge his people of this realm without special assent of the Commons, to (do) a thing which may be of profit to the common people, but not to their charge; as it is held in the 13 of H. 4. 16. *Et statutum de tallagio non concedendo, nullum tallagium, seu auxillium per nos, seu hæredes nostros ponatur seu levetur absque voluntate et assensu Parliamenti. Et Magna Charta cap. 30. Omnes mercatores (nisi publice antea prohibiti fuerint) habeant saluum & securum conductum abire de Angliâ & venire in Angliam, & morari & ire per Angliam, tam per terram quam per aquam, ad emendum & vendendum sine omnibus malis tolnetis per antiquas & rectas consuetudines, præterquam in tempore guerræ*; which statute hath been confirmed more than thirty times by several acts of Parliament. Vide le statute 25 Ed. 1. 3 Ed. 1. in *Turri*. 9 Ed. 3. cap. 1. & 2. 14 Ed. 3. 2. 25 Ed. 3. cap. 2. &c. The effect of which is, that every merchant of this realm, or other, may freely buy, sell, and pass the sea with all their merchandizes, paying the customs of ancient time used. Queen Mary put an imposition upon cloaths, which 1 El. Dy. 165. was moved and not resolved. Vide 31 H. 8. Dyer fol.

Customs, subsidies, and impositions.

See Cotton's Records 91, 138, 152. and ib. tit. Taxes, &c. in Tabula. 4 Inst. 28 to 34.

+ Lane's Rep. 22.

Q.

Customs, Subsidies, and Impositions. Part XII.

43. & 1 El. 165. *Magna custuma & parva custuma. Vide 9 H. 6. 12 & 35.* And notethere the saying of Babington. Note the 1 Eliz. Dyer 165. there was *antiqua sive magna custuma* at the common law, *scil.* for wools, wool-fells, and leather, and this was equal to strangers as well as denizens; and in the time of Ed. 1. on merchant strangers, a grant is over the said customs, 3s. 4d. which is called *nova seu parva custuma*.

Upon all which and divers records which we had seen, it appeared to us, that the King cannot at his pleasure put any imposition upon any merchandize to be imported into this kingdom, or exported, unless it be for advancement of trade and traffic, which is the life of every island, *pro bono publico*. As if in foreign parts any imposition is put upon the merchandizes of our merchants, *non pro bono publico*; and for to make equality for the purpose to advance trade and traffic, the King may put an imposition upon their merchandizes, for this is not against any of the statutes which were made for advancement of merchandize, or of the statutes of *Magna Charta*, c. 30. which is, *Si aliqui mercatores de terrâ contra nos guerrina inveniantur in terrâ nostrâ in principio guerræ attachientur, &c. Quo modo mercatores terræ nostræ tractantur qui tunc inveniantur in terrâ illâ contrâ nos guerrina: et si nostra salvi sunt ibi, illi salvi sunt in terrâ nostrâ*; for the end of all such restraints is *salus populi*: and so in the case of currants, which was now lately adjudged in * the Exchequer: also in the case of Customer Smith, which was adjudged in the Exchequer, in the reign of Queen Elizabeth, both the impositions were imposed, upon the said reason to make equality; for this was the truth of both cases (*scil.*) the advancement of trade and traffic, and for this cause such impositions were lawful.

And it was clearly resolved by us, that such impositions so put, cannot be demised or granted to any subject, for this, that it is to augment and decrease, or be quite taken away upon just occasion for advancement of merchandize. And this was one of the reasons in Customer Smith's case, that it could not be demised; also it was assessed after the demise or grant.

And although that the King may prohibit any person in some cases with some commodities to pass out of the realm, yet this cannot be where the end is private, but where the end is public, *viz.* to restrain the person, for this, that *quam plurima nobis & coronæ nostræ prejudicialia in partibus exteris prosequi intendit*, and to restrain any merchandizes either in time of dearth, or in time of war, for *necessitas est lex temporis*.

It

Part XII. Customs, Subsidies, and Impositions.

It appeared unto us also, that at the common law no custom was paid, but only for wools, wool-fells, and, leather, which is called in *Magna Charta*, *recta consuetudo*, and all others are there called *mala tolmeta*, which in the statute *De tallagio non concedendo* is called *mala tolmeta*. And at the beginning of the reigns of Kings, it hath for a long time been used, by authority and consent of Parliament, to grant to the King certain subsidies of tonnage and poundage, for term of his life, which began in such form, 2 & 3 H. 5. in the 31 H. 6. c. 8. & 12 Ed. 4 c. 3. For the defence of the realm, and maintenance of certain wars, by act of Parliament, which proves, that the King by his own power cannot impose it, but by consent of Parliament; but such subsidy of tonnage and poundage might be granted by the King so long as he lived; for this, that this is limited and given to the King in certain: but an imposition put for equality, as hath been said, hath not any certain continuance, but is to be augmented, diminished, or taken away, for the benefit of the commonwealth: and for that cause it cannot be demised. *Vide* 31 H. 1. Dyer 43. 1 Mar. D. 92. 1 El. D. 165. 2 & 3 P. & M. D. 128. 12 El. D. 296. 23 El. D. 375. 45 Ed. 3. c. 4. 27 Aff. pl. 44. Register 192, &c.

Tonnage and poundage.
See Selden's Mare Clausum. 193, 194, 195. 33 H. 6. 17. b. 4 Inst. 32, 33.

Vide M. Ch. cap. 30. they are called *Consuetudines*, & per *vocabulum artis* they are called *Custumata*. *Vide* le stat. 51 H. 3. title Exchequer in Rastall: it appears that there were ancient customs, and those were for wools, wool-fells, and leather. *Vide* le statute 9 Ed. 3. c. 2. that all charters and letters patent against free trade and traffic made, or to be made, are void.

Vide Fortescue in his Comment of the Laws of England, cap. 3. 6. fol. 43. *Neque Rex per se vel per ministros suos tallagia, subsidia, aut quævis alia onera imponit legeis suis, aut leges eorum mutat, vel novas condit, sine concessione et assensu totius regni sui in Parlamento suo expresso, &c.* *Vide* fol. 13 cap. 9.

And note, for the benefit of the subject, the King may make an imposition or toll within the realm, to repair highways, bridges, and to make walls for defence: but then the sum imposed ought to be proportionable to the benefit: and this appears the 13 H. 4. 16. So the imposition for equality ought to be for the public good; see the charter 31 Ed. 1. which is called *Charta mercatoria*, ex rot. mercator' an. 31 Ed. 1. n. 42. Patents 3 Ed. 1. n. 1 & 9. de sacco lanæ dimidium marcæ; lasta coriorum, 1 Mark, &c. Fines 3 Ed. 1. n. 24. intus et non in dorso. *Vide* rot. Parliament. an. 13 Ed. 3. No new enhancement of customs to be without common * consent: and in

Toll: quere if such toll may be general, or only on some particular townships? as ancient demaine towns, &c.

22 Ed. 3. n. 8. against new customs and impositions, and that merchants may freely pass, &c. And in the Parliament an. 8 H. 6. n. 29. Against the new impositions granted by H. 5. upon merchandizes coming to Bourdeaux: and Parliament 28 H. 6. n. 35. the Duke of Somerset accused for causing the King to grant unto Sir Pierce Bracy an imposition of wines.

Par. 9 R. 2. n. 30 against a patent made to the Lieutenant of the Tower, by colour of which he took custom of wine, oysters, and other victuals. to be void.

29 Ed. 3. 11. n. *Ex Rot. Parliamenti*, subsidy of wools granted for six years, so as during the same time no other aid or imposition be laid upon the Commons.

Parliament 5 Ed. 3. n. 17, 18, 19. against new impositions upon staple commodities, Parl. 22 Ed. 3. n. 31. against alnage of worsteds, 5 Ed. 3. n. 163. against all new impositions, and 5 Ed. 3. n. 191. 38 Ed. 3. n. 26. rot. Parl. against unreasonable impositions.

Parl. 7 R. 2. n. 35, 36. 9 R. 2. n. 30. No impositions or taxes without consent of Parliament.

Note 2 R. 2. *Parl. apud Glocestriam*, act 25. Subsidy only for defensive wars, not for invasive, 1 R. 2. Parl. Accord. 1 R. 3. against benevolence. *Vide Claus. 4 Ed. 3. n. 22. bis.*

Dr. EDWARDS *versus* Dr. WOOTON.

Libels.
Star-chamber.
Post. 103.
3 Inst. 174.
Cumberb. 36,
358, 359.
2 Salk. 417, 418.
1 Hawk. c. 73.
2 Hawk. vide
Tabula.
5 Co. 2 Part
124, 5.
9 Co. 59.
10 Co. 75.

IN the case in the Star-chamber, between Edwards a Physician plaintiff, and Wooton a Doctor in Physic defendant.

The case was, "that Dr. Wooton writ to Edwards an infamous, malicious, scandalous, obscene letter, to which he subscribed his name; and this he sealed and directed, To his loving friend Mr. Edward Speed this; and after the said Doctor published and dispersed to others a great number of copies of the said letter."

And it was resolved by the Lord Chancellor Egerton, the two Ch. Just. *et per totam curiam*, that this was a subtle and dangerous kind of libel: for inasmuch as the writing of a private letter to another, without any other publication, the party to whom it is directed cannot have an action *sur le case*, for this, that no action lies; but when it is published to others

to the scandal of the plaintiff, as it hath been oftentimes adjudged, an action lieth.

The Doctor thought that this could not be punished in any manner; but it was resolved, that the said infamous letter, which in law is a libel, shall be punished (although it was solely writ to the plaintiff without any other publication) in the Star-chamber, for that it is an offence to the King, and is a great motive to revenge, and tends to the breaking of the peace and great mischief: and for that reason it was necessary, that it should be punished either by indictment, or in the Star-chamber, to prevent such occasions of mischief. But in the case at the bar, the dispersing of copies of it, or the publication of the effect of it, aggravates the offence, and makes it a new offence: for, for that also the party may have an action *sur le case*.

Note, that by the civil law, if any person hath (to disable himself to bear any office, or for any other purpose) made a libel against himself, he shall be punished for it. And so it seems to me, he should be in the Star-chamber; for this is an offence to the King and the commonwealth: and without question, although that the Doctor subscribed his name to the said letter, yet the said letter importing the scandalous matter of a libel, is in the law a libel.

* *Nota*, the law of the Lydians was, that he who slanders another shall be let blood in the tongue, and he, who hears it and assents to it, in the ear, &c. Page [36]

WOOTON *versus* EDWIN.

Mich. 5 Jacobi.

Reservation.

INTER *Johannem Wooton quer. et Johannem Edwin defendentem*. In replevin the defendant avowed, and the plaintiff demurred; and the case was thus.

"William Hawes was seised in fee of a messuage, and fifty-five acres of land, five acres of meadow, and six acres of pasture in Fromanton in the county of Hereford:" and 27 Junii 28 H. 8. by indenture demised the tenement aforesaid to Nicholas Traheren, for seventy-nine years, *reddendo inde annuatim præfato Gulielmo Hawes, & assignatis suis 26 s. 8 d.* at the feasts of the Annunciation and

This case will scarcely be allowed for law at this day.

St. Michael by even and equal portions: and after the lessor died, and the reversion descended to William his son, under whom the said John Edwin claimed.

And the sole point in this case was, if the rent reserved in this case shall go to the heir, or shall be determined by the death of the lessor, for if the lessor had reserved the rent to him without more, this shall determine by the death of the lessor; and the addition of these words ("and his assignees") shall not enlarge the reservation, for if the lessor had assigned the reversion over, yet the rent shall determine by his death, for the assignees cannot have the rent longer than the lessor himself should have it; and the lessor himself hath it but for term of his own life. *Vide* 11 Ed. 3. tit. Assise 86. 10 Ed. 4. 18. 27 H. 8. 19. *per* Audley, *et vide* Hil. 33 Eliz. rot. 1341. In this court in a replevin, *inter* Richmond and Butcher, where the case was, that Butcher avowed for a rent as heir to his father, upon a demise made by his father of certain lands for 21 years, by these words, *reddendo et solvendo proinde durante prædicto termino 21. annorum præfato (patri) executoribus & assignatis suis 10 l. legalis monetæ Angliæ, &c. ad festa, &c.* And it was adjudged, that by this reservation the heir should not have the rent for that the reservation was made to the father, his executors and assignees, and not to his heirs, &c.

Owen 9.

Corone, Buggary.

Corone, * BUGGARY.

Mich. 5 Jacobi.

* *Nota, Buggrone, Italice, is a Buggarer, and Buggerare is to bugar, so Buggary cometh of the Italian Word.*

1 Hawk. ch. 4.
1 Inst. 58.
1 Hale P. C.
628.

THE letter of the statute of the 25 H. 8. cap. 6. If any person shall commit the detestable sin of buggary with mankind or beast, &c. it is felony, which act being repealed by the statute 1 Mar. is revived and made perpetual by 5 Eliz. cap. 7. and he shall lose his clergy.

It appears by the ancient authorities of law, that this was felony; but they vary in the punishment, for Brit. cap.

Part XII.

BUGGARY.

cap. 9. saith, that "sorcerers, sodomers, and heretics" shall be burnt, F. N. B. 269. a. agrees with it: but Flet. lib. 1. cap. 35. *Pecorantes & sodomitæ terra vivi suffodiantur.* But in the ancient book * called the Mirror of Justice vouch-
ed in Plow. Com. in Fogosse's case, the crime is more high, for there it is called, *Crimen læsæ Majestatis*, a sin horrible, committed against the King of heaven: and this is either against the King celestial or terrestrial in three manners; by heresy, by buggary, by sodomy. Note, that sodomy is with mankind, and it is felony by the statute of 25 H. 8. and therefore the judgment for felony doth now belong to this offence, viz. to be hanged by the neck till he be dead. To make that offence, *oportet rem penetrare, et semen naturæ emit-tere, et effundere*, for the indictment is *contra ordinationem Creatoris et naturæ ordinem rem habuit veneream, dictumque puerum carnaliter cognovit.* Every of which (*rem habuit, et carnaliter cognovit*) imply penetration and emission of seed: and so it was held in the case of Stafford, who was attaint in the King's Bench and executed. *Pæderastes, amator puerorum*, whereof the Greek word is, *Παιδεραστία*, buggary with boys. Vide Rot. Parliament. 50 Ed. 3. num. 58. complained in Parliament, that a Lumbard did commit the sin that was not to be named: so in rape, there ought to be penetration and emission of seed. Vide Stamford, fol. 44. Which statute makes it felony; he who procures, &c. or receives the offender, &c. is accessory.

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The words of the statute of West. 1. cap. 34. If a man ravish a woman, 11 H. 4. 18. If one aid another to commit rape, and if he be present, he is principal in the buggary, &c. Vide Leviticus 18, 22. & cap. 10, 13. 1 Cor. 6. v. 9, &c.

P R E M U N I R E.

NOTE, in the book of Doctor Cosines, intituled, an Answer, &c. to the Abstract, and published 1584. And a pamphlet now lately published by Doctor Ridley, they would obtrude upon the world, that forasmuch as that now by the act of 10 Eliz. cap. 1. all spiritual and ecclesiastical power within this realm is annexed to the crown, and the law, by which they determine causes which belong to their cognizance, is the ecclesiastical law of the King:

21. 5 Co. 5, 12. 16 to 26. 7 Co. 12, 14, 16. 9 Co. 74. 11 Co. 34, 63. Vid. that

Premunire.

Vide 15 H. 7.

9. Premunire

was at the con-

mon law.

Post. 84, 85.

Co. Lit. 129,

130. 4 Inst. 139.

1 Hawk. c. 19.

per tot. & ch.

79. sect. 12. &

Præfa. to 6 Co.

that for that cause no Premunire lies against any spiritual judge for any cause whatsoever. And some other of their professions have some other reasons to confirm it.

1. That when the statute of Premunire was made, viz. in the reign of the Kings Ed. 3. and R. 2. then the Pope usurped ecclesiastical jurisdiction, although that *de jure* it belonged to the King. And therefore forasmuch as the King is as well *de facto*, as *de jure*, supreme head of all, as well ecclesiastical as temporal; now the cause being changed, the law is changed also.

2. The conclusion of the writ of Premunire is *in domini Regis contemptum et præjudicium, & dictæ coronæ dignitatum suarum læsionem et exhæredationem manifestam, et contra formam statuti, &c.* Which proves that the jurisdictions shall be now severed, and united to the crown; for that which is united to, and derived from the crown, cannot be said *contra coronam et dignitatem Regis*.

3. The Court of High Commission is the court of the King, and is by force of an act of Parliament and letters patent of the King: and for this, although it may be said, that the consistory courts are *curiæ Episcoporum*, yet the court by force of high commission is the court of the King: and for that reason their proceedings shall not be subject to Premunire.

4. This new court is erected by act of Parliament, and letters patent of the King: and for this, where the statute of R. 2. speaks *de curia Romana seu alibi, &c.* This (*alibi*) cannot extend to a court erected by Parliament, *anno 10 Reg. Eliz.*

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But to these objections it was answered and resolved by divers Justices * in this very term, that without question the statutes 37 Ed. 3. 16 R. 2, &c. *De Premunire*, are yet in force: and all such proceedings, by colour of ecclesiastical law before any ecclesiastical Judges, who were in danger of Premunire, before the said act 1 El. are now in case of Premunire after the said act; be it before the Commissioners by force of a high commission, or before Bishops or other ecclesiastical Judges: for the said acts of Premunire are not repealed by the said act 1 Eliz.

And as to the first and second objections, it was answered, that true it is, that the crown of England hath as well ecclesiastical as temporal jurisdiction, *de jure* annexed to it, as appears by the resolution in Cawdrey's case, from age to age: and although this was *de jure*, yet when the Pope became so potent and powerful, he did usurp upon

upon the King's ecclesiastical jurisdiction within this realm: but this was but mere usurpation, (for the King cannot be put out of the possession of any thing which belongs to his crown.) And for this reason, all the Kings of this realm *totis viribus providere* for the establishment of their temporal law, by which they inherit the crown, and by which they govern their subjects in peace, and punish those who are rebellious, or who commit great offences against them and their crown: and they were always jealous lest any part or point of their temporal law should be incroached upon: and for this, if the ecclesiastical law usurp any thing upon the temporal law, this was severely punished, and the offender esteemed and adjudged an enemy to the King by the ancient statutes; and every one might have killed him before the statute 5 Eliz. and this is the reason for why: although both jurisdictions belong to the crown, yet inasmuch as the crown itself is directed and descendible by the common law, and all treason against the crown punished by this law; for this cause, when the ecclesiastical Judge usurps upon the common law, it is said *contra coronam et dignitatem, &c.* And all the prohibitions directed to the high commissioners from year to year, from the time of the making of the said statute 1 Eliz. do conclude, *contra coronam et dignitatem regiam.*

For, as it was resolved by all the Justices, *Pasc. 4 Jac. Regis est contra coronam & dignitatem regiam*, when any ecclesiastical Judge doth usurp upon the temporal law, because as in all those writs it appeareth, the interest or cause of the subject is drawn *ad aliud examen*, that is, when the subject ought to have his cause ended by the common law, whereunto by birth-right he is inheritable, he is drawn *in aliud examen*, (viz.) to be decided and determined by the ecclesiastical law: and this is truly said *contra coronam & dignitatem regiam*. And this appears by all the prohibitions (which are infinite) which have been directed to the high Commissioners and others after the said act 1 Eliz. *a fortiori*, he who offends in Premunire shall be said to offend *contra coronam et dignitatem regiam*: and this in effect answers to all the afore-said objections; but yet other particular answers shall be given to every of them.

As to the third, although the court by force of high Commission is the court of the King, yet their proceedings are ecclesiastical: and for this, if they usurp upon the temporal law, this is the same of-

fence which was before the said act of 10 Eliz. for this was the end of all the ancient acts, that the temporal law shall not in any manner be emblemished by any ecclesiastical proceedings.

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As to the fourth, although it be a new court, yet the ancient statutes extend to it within this word *alibi*, and divers new bishoprics were erected in the time of H. 8. and yet there was never any question, but that * the ancient acts of Premunire extended to them.

But to answer to all the objections aforesaid, founded upon the said statute of 1 Eliz. out of the words and meaning of the same act; for whereas the act 1 Eliz. repealed the statute of 1 & 2 P. M. c. 8. there is an expresse proviso in the said act 1 Eliz. that that shall not extend to repeal any clause, matter, or sentence contained or specified in the 1 & 2 P. M. which in any sort toucheth or concerneth any matter or cause of Premunire: but that all of that, which doth touch or concern any matter of Premunire, shall stand in force and effect: and the clause of 1 & 2 P. M. which concerns matter of Premunire, is such; every person who by any process out of any ecclesiastical court of the realm, or out of it, or by pretence of any spiritual jurisdiction, or otherwise, contrary to the laws of the land, shall unquiet or molest any man for any thing, parcel of the possession of any religious house, shall incur the danger of the act of Premunire, *anno* 16 R. 2. which proves that as well the act 1 & 2 P. & M. as the act 1 Eliz. which creates the high-commission court, which refers to the act of 1 & 2 P. & M. intends by expresse words, that the act of 16 R. 2. of Premunire shall stand in force. Also the act of 1 Eliz. revives the act of 25 H. 8. cap. 10. which makes a Premunire in a Dean and Chapter, &c. for not electing, nor certifying, or not admitting of any Bishop elected; by which it is directly proved, that the act 1 Eliz. never intended to take away the offence of Premunire, but expressly provided for it, as appears by that which hath been said.

Premunire
See 1 Inst. 129,
130.

But then we are to note in what cases a Premunire lies, in what not.

And for this that it is so penal, it is necessary that it should be explained and made known.

Regula prima.

In all cases, when the cause originally belongs to the cognizance of the ecclesiastical court, and suit is prosecuted there, in the same nature as the cognizance belongs

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PREMUNIRE.

belongs to them, although in truth the cause, all circumstances being disclosed, belongs to the court of the K. and to be determined by the common law,) yet no Premunire lies in that case, but a prohibition. As if tithes are severed from the nine parts, and are carried away: if the Parson sue for the subtraction of these tithes in the spiritual court, this is not within the case of Premunire; for it may be that the plaintiff did not know that they were severed from the nine parts, nor that they were carried away; nor may the ecclesiastical Judge know any thing of it: and although that the defendant pleads this, yet the Ecclesiastical Court may proceed to try the truth of it without danger. *Vide* 10 H. 4. 2. according with this opinion: so if a Parson sue for tithes of wood, surmising that they were *sylvæ caduæ*, under the age of twenty years, whereas in truth they were above the age of twenty years (in which case by the statute of 45 Ed. 3. tithe ought not to be paid) yet a prohibition lieth and no Premunire.

See Watson's
Clergiman,
chap. 54.

But although the cause originally may appertain to the cognizance of the ecclesiastical Judge, yet if he sue for it in the nature of a suit, which doth not belong to the Ecclesiastical Court, but to the common law, there a Premunire lieth; as in the case put before: if the Parson, after the severing of tithes, will in any Ecclesiastical Court within this realm sue for carrying away his tithes severed from the nine parts, which action by matter apparent to the Ecclesiastical Court appertains to the common law; in such case both the actor and the Judge incur the danger of a Premunire: and so it was adjudged in 17 H. 8. as Spilman reports it: one Turbervile sued a Premunire against a Parson, who by citation convened him into the Ecclesiastical court within this realm, * and there libelled against him for taking of tithes, which were severed from the nine parts, and the Parson was condemned and had judgment that he should be out of the protection of the King, and forfeit all his lands, goods, and chattels, and his body to perpetual imprisonment, and damages to the party. So if a mortuary be delivered to a Parson, and after the party retake it, if the Parson sue for this as for a mortuary to him delivered and carried away, he is in case of a Premunire; but after the reprisal, if he sue for it as mortuary not executed, in nature of a suit, which belongs to Court-Christian, upon the truth of the case there is cause of

Regula secunda.

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Prohi-

prohibition, and no Premunire lies. *Vide* 10 H. 4. 2. So the case which hath been put of suit for tithes of wood, if the Parson sue for tithes of wood above twenty years growth, so that it appears by the libel, that the cognizance of this case doth not belong to Court-Christian (*viz*) to the court of the Archbishop of Canterbury, the Premunire lies, as you may see in the book of Entries, tit. Dismes, fol. 221. But in the tit. Prohibition, fol. 449, *Divisione dismes*, pl. 2, 3, 4, 5, & 6. if the suit be *pro sylva cædua*, &c. So that, as the suit is framed, the cognizance belongs to Court Christian, although that the truth be otherwise, there a prohibition lies, and no Premunire. For when the cause originally belongs to the cognizance of the Ecclesiastical court, although they hold plea of any incident to it, which belongs to the common law, there prohibition lies, and not Premunire.

Regula tertia,

Antea 27, 39.

When the cause originally belongs to the cognizance of the common law, and not to the Ecclesiastical Court, there although they libel for it according to the course of the ecclesiastical law, yet the Premunire lieth, for this, that this draws the cause, which is determinable at the common law, *ad aliud examen*, *viz.* to be decided by the civil or ecclesiastical law; and so deprives the subject of the benefit of the common law, which is his birthright: and with this agrees the book of Entries, tit. Premunire, fol. 229. b. & 430. a. where it is put for a rule, *Quod cum placita, querelæ, et possessiones terrarum et tenementorum transgr' debitorum & aliorum consimilium infra regnum Angl' illat' ad dominum Regem ad regalem coronam & dignitates suas specialiter, & non ad forum ecclesiasticum, pertinent. Quidem, J. R. &c. machinans dominum Regem & coronam & dignitates suas exheredare, & cognitionem quæ ad curiam domini Regis pertinent, ad aliud examen infra regnum suum Angl' in Curiam Christianitatis coram A. W. officiali, &c. trahere, &c. quendam articulum ad prosequendum ipsum R. in eadem Curia Christianitatis coram præfato Officiali pro debito 20 l. & ipsum R. in eadem curia præfato I. A. inde responsum citari, &c.* So that if the original cause be temporal, although that they proceed by citation, libel, &c. in ecclesiastical manner, yet this is in danger of Premunire: and the reason of this offence is expressed in the writ, for this, that he endeavours to draw *cognitionem (causæ)* *quæ ad curiam domini Regis pertinet, ad aliud examen*, which is as much as to say, that the debt, the cognizance whereof belongs to the court

court of the King, and to be determined by the common law, he intends by the original suit to draw it to be determined by the ecclesiastical law.

And note, in the indictment of Premunire against Cardinal Wolsey, Mich. 21 H. 8. it is said, *Quod prædictus, Cardinalis &c. intendit finaliter antiquissimas Angl^e leges penitus subvertere & enervare, universumque hoc regnum Angl^e & ejusdem Angl^e populum legibus imperialibus vulgo dictis legibus civilibus & eorum legum canonibus in perpetuum subjugare * & subicere, &c.* and this is included within these words, *ad aliud examen trahere, viz.* to decide that by the civil and ecclesiastical laws, which is determinable by the common law : and upon this was a notable case in Hil. an. 25 H. 8. the case of Nich. Bishop of Norwich, against whom, he then being in the custody of the Marshalsea, the King's Attorney preferred a bill of Premunire : and the matter of the Premunire was such : within Thetford in the county of Norfolk hath been *de tempore cujus, &c.* such custom, that all ecclesiastical causes arising within that town should be determined before the Dean of the same town, who hath within it peculiar jurisdiction ; and that none in the same town shall be drawn in plea in any other Court-Christian for ecclesiastical causes, unless before the same Dean : and if any be against the said custom drawn in suit before any other ecclesiastical Judge, and this be presented before the Mayor of the same town, that such party shall forfeit 6 s. 8 d. And that an inhabitant of Thetford sued in the consistory Court of the said Bishop, at Norwich for an ecclesiastical cause arising within the said town of Thetford, and this was presented before the Mayor of Thetford according to the custom, for which he forfeited 6 s. 8 d. the said Bishop cited the said Mayor to appear before him at his house in Hoxin in Suffolk, generally *pro salute animæ*, and upon appearance libelled *per parole*, upon all the matter, and enjoined him upon pain of excommunication to annul the said presentment before a day : and upon a Premunire brought for this matter the said Bishop had counsel learned assigned him ; and they objected, that as well the said presentment as the said custom were for divers causes void, and therefore it cannot be said *contra coronam & dignitatem regiam* ; nor hath the Bishop drawn the party *ad aliud examen*, for it ought not to be examined in any court.

2. They objected, that the Court of the Bishop was not intended within the act of 16 R. 2. 32. but *in Curia*

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ria Romana aut alibi; and this *alibi* ought to be intended out of the realm; but it was resolved by Fitz-James Chief Justice, *et per totam curiam*, that be the custom and presentment good or not, this is a temporal thing and determinable by the common law, and not examinable in the spiritual court; and for this the Bishop in this case hath incurred a Premunire.

3. That *alibi* extends as well to the courts of the Bishops, and other ecclesiastical courts within this realm, as elsewhere: and so the court said, that it had been oftentimes adjudged, upon which the said Bishop, (the matter of the indictment being true) confessed the said indictment: and upon this appearing the secondary Justice gave judgment against him, that the said Bishop shall be out of the protection of the King, and that his lands, goods, and chattels should be forfeited to the King, and his body to be imprisoned *ad voluntatem Regis, &c.*

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Ecclesiastical
commission.

See ant. 19, 20,
21. Post. 45. 49,
to 56, 15, &c.

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See the Intro-
ductory Dis-
course to Gib-
son's Codex, p.
20, 21. that the
spiritual Judge
has a right to
interpret all sta-
tutes relating to
spiritual matters.
But the Bishop
is notoriously mistaken, and throughout the book appears too partial to his own order.

IN the great case of Nicholas Fuller of Gray's-Inn, these points were resolved upon conference had with all the Justices and Barons of the Exchequer.

1. That no consultation can be granted out of the term, for this, that it is an award of the court, and is final, and cannot be granted by all the Judges out of the term, nor by any of them within the term out of court: and the name of the writ, *viz* a writ of consultation, imports this, that the court upon consultation amongst them ought to award it.

* 2. That the construction of the statute 1 Eliz. cap. 1. and of the letters patent of high commission in ecclesiastical causes founded upon the said act, belongs to the Judges of the common law; for although that the causes, the cognizance of which belongs to them, are merely spiritual, and the law by which they proceed is merely spiritual, yet their authority and power is given to them by act of Parliament, and letters patent, the construction of which belongs to temporal Judges: and
for

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for this, the consultation which was granted is with this restraint. *Quatenus non agat de autoritate et validitate literarum patentium pro causis ecclesiasticis vobis vel aliquibus vestrum directi aut de expositione & interpretatione statuti de anno primo nuper Reginae, &c.* In the same manner as if the King hath a benefice donative by letters patent, although that the function and office of the incumbent be spiritual; yet inasmuch as he comes to it merely by letters patent of the King, he shall not be visitable, not deprivable by any ecclesiastical authority, but by the Chancellor of the King, or by Commissioners under the great seal.

3. It was resolved when there is any question concerning what power or jurisdiction belongs to ecclesiastical Judges, in any particular case, the determination of this belongs to the Judges of the common law, in what cases they have cognizance, and in what not; for if the ecclesiastical Judges shall have the determination of what things they shall have cognizance; and that all that appertains to their jurisdiction, which they shall allow to themselves, they will make no difficulty *ampliare jurisdictionem suam*: and according to this resolution, *Braet. lib. 5. Traet. de except. cap. 15. fol. 412. Cum iudex ecclesiasticus prohibitionem a Rege suscepit, supersedere debet in omni casu, saltem donec constiterit in curia Regia ad quam pertinet jurisdictionem; quia si iudex ecclesiasticus aestimare debet an sua esset jurisdictio, in omni casu indifferenter procederet, non obstante Regia prohibitionem. Vide Entries fol. 445.* There was a question whether the Court-Christian should have cognizance of a lamp. And a prohibition was granted, *Quod non procedant in Curia Christianitatis, quousque in curia nostra discussum fuerit, utrum cognitio placiti illius ad curiam nostram vel ad forum ecclesiasticum pertineat.* And so the determination of a thing, whether it belongs to Court-Christian, doth appertain to the Judges of the common law, and the Judges of the common law have power to grant a prohibition. And all this appears in our books, that the Judges of the common law shall determine in what cases the ecclesiastical Judges have power to punish any *p. a læsione fidei*, 2 H. 4. fol. 10. 11 H. 4. 88. 22 Ed. 4 20. So of the bounds of parishes in 5 H. 5. 10. 39 Ed. 3. 23. So it belongs to the Judges of the common law, to decide who ought to certify excommunication, and to reject the certificate, when the Ordinary or Commissary is party, 5 Ed. 3. 8. 8 Ed. 3. 69, 70. 18 Ed. 3. 58. 12 Ed. 4. 9 H. 7. 1. 10 H. 7. 9. For this it was resolved clearly, that if any person slander the authority or power

power of the High Commissioners, this is to be punished before the Judges of the common law, for that the determination of their authority and power which is given to them by the statute, and the letters patent of the King belong to them, and not to Court-Christian: and for this, that the many articles objected against Fuller concerning the slander of their authority and power, was solely determinable and punishable before the Judges of the common law. One other restraint was added in the consultation: *et quatenus non agat de aliquibus scandalis, contemptibus, seu aliis rebus, quæ ad communem legem aut per statuta regni nostri Angl' sunt punienda & determinanda.*

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4. It was resolved, that if a Counsellor at law, in his argument shall * scandal the King or his government, temporal or ecclesiastical, this is a misdemeanor and contempt to the court; for this he is to be indicted, fined, and imprisoned, and not in Court-Christian: but if he publish any heresy, schism, or erroneous opinion in religion, he may be for this convened before the ecclesiastical Judges, and there corrected according to the ecclesiastical law: for the rule is, *quod non est juri consonum quod quis pro aliis quæ in curiis nostris acta sunt, quorum cognitio ad nos pertinet, trahatur in placitum in Curia Christianitatis*, as it appears in the Book of Entries, fol. 448. So that the intent is, that heresy, schism, or such enormous opinions in religion, do not appertain to the cognizance of temporal courts: for this cause a consultation was granted, *quoad schismata, hæreses, et inormiam impiam, vel perniciosam opinionem in religione, fide, seu doctrina christiana pie & salubriter stabilita infra regnum nostrum Angl', quorum cognitio ad forum ecclesiasticum spectat, &c. Vide Mich. 18 H. 8. Rot. 78. in Banco Regis.* The case was, that a Leet was held *die Jovis post festum Sancti Mich. Arch. 17 H. 8.* of the Prior of the house of St. John de Bethlehem de Sheine, of his manor of Levisham in the county of Surry, before John Beare the Steward there, a grand jury was charged to enquire for the King of all offences inquirable within the said leet, where one Philip Aldwin, who was resident within the said leet, appeared at the said leet, *Idemque Philippus sciens quandam Margaretam, uxorem Johannis Aldwin apud East Greenwich, infra jurisdictionem letæ prædictæ, pluries per antea corpus suum in adulterio vitiose exercuisse, ac volens ipsam Margaretam pro republica in exemplum taliter offendere volentium legitime punire, ad dictam magnam juratam se personaliter exhibuit, et eisdem sic juratis de dictâ malâ et vitiosa*

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vitiosa vita præfata Margaret' instructionem et informationem veraciter dedit. Upon which the said Margaret did draw the said Philip into the court of the Archbishop of Canterbury, and there did libel against him for defamation of adultery; and that the said Philip said *in hisce Anglicanis verbis*; Margaret Aldwin is a whore and a bawd, and it is not yet three weeks agoe since a man might take a Priest betwixt her legs; which English words were parcel of the words by which he informed the grand inquest at the said leet: and upon this he had by award of the court a prohibition, by which writ it appears, *Quod per leges hujus regni Angl' omnes & singuli quicunque domini Regis subditi coram quibuscunque ipsius domini Regis Justiciariis seu quocunque alio viro judiciali officio seculari fungente in aliquam juratam patriæ jurati, vel ad aliquas instructiones seu informationes alicui hujusmodi jurat' in evidencias dandas comparentes & evidencias dantes, ab omni impetitione & calumnia in aliqua Curia Christianitatis propterea fienda, quieti & liberi esse debent, & in perpetuum penitus irreprehen'.* And by this record it appears, and by the statute of 10 Ed 3. c. 11. by which it is provided, that indictors of lay people, or Clerks in turns, and after delivering them before Justices, shall not be sued for defamation in Court-Christian, but that the plaintiff who finds himself grieved shall have a prohibition formed in the Chancery upon his case, which was but an affirmance of the common law, for that the statute provides only for indictors in the turn only: and yet as well all indictors in other courts, and all witnesses, and all others who have affairs in the temporal courts, shall not be sued or molested in Court-Christian. *Vide Pasch. 6 Eliz.* in the Reports of the Lord Dyer, (which case is not printed) John Halles in the case of marriage between the Earl of Hereford and the Lady Catherine Gray, declared his opinion against the sentence given by Commissioners delegates of the Queen, in a cause ecclesiastical under the great seal: * and that the said sentence in disaffirmance of the said marriage was unjust, wicked, and void, and that he thought that the said Judges delegates had done against their conscience, and could not render any reason for the said sentence: and what offence this was, was referred to divers Judges to consider; by whom upon great deliberation it was resolved, that this offence was a contempt as well against the Q. as to the Judges; and every of them were punishable by the common law,
by

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by fine and imprisonment: and that the Queen may upon that sue for it in what court she shall please; for the slander of a Judge in point of his judgment, be it true or false, is not justifiable, &c. And all this appears by the report of the Lord Dyer, so that in the said consultation it was well provided, that the High Commissioners should not intermeddle with any scandal by the common law.

5. It was resolved, that when any libel in Ecclesiastical Court contains many articles, if any of them do not belong to the cognizance of Court-Christrian, a prohibition may be generally granted; and upon motion made, consultation may be made as to things which do belong to the spiritual jurisdiction: for the writ of consultation with a *quoad*, is frequent and usual, but a prohibition with a *quoad*, is *rara avis in terrâ nigroque simillima cygno*. And for these reasons it was resolved by all, that the prohibition in the case at bar was well granted, which in truth was granted by Fenner and Croke Justices, in the time of the vacation.

Note these general rules concerning prohibitions, *quæ sparsim inveniuntur in libris nostris*.

Articuli Cleri,
c. 8.

Non debet dici tendere in præjudicium ecclesiasticæ libertatis quod pro Rege & repub' necessarium videtur.

Entries 444,
447.

Non est juri consonum, quod quis super iis quorum cognitio ad nos pertinet in Curia Christianitatis trahatur in placitum.

Circumspecte
agatis, &c.

Episcopus teneat placitum in Curia Christianitatis de iis quæ mere sunt spiritualia.

West. 2. cap.
43.

Prohibeatur de cætero Hospitalariis & Templariis ne de cætero trahant aliquem in placitum coram Conservatoribus privilegiorum suorum de aliquâ re cujus cognitio ad forum spectat Regium.

Ibidem.

Non concedantur citationes priusquam exprimat super qua re fieri debet citatio.

The knowlege of cases testamentary, matrimony, &c. by the goodness of the Princes, and by the laws and customs of the realm, appertain to spiritual jurisdiction.

6. It was resolved, that this especial consultation, being only for heresy, schism, and erroneous opinions, &c. that if they convict Fuller of heresy, schism, or erroneous opinion, that he shall never be punished* by ecclesiastical law: and after the said consultation granted, the said Commis. proceeded and convicted Fuller of schism and erroneous opinions, and imprisoned

* Note.

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prisoned him and fined him two hundred pounds:—and after in the same term, Fuller by his counsel moved the Court of King's Bench to have a *Habeas corpus, et ei conceditur*, upon which writ the goaler did return the cause of his detention.

* Of First Fruits and Tenths. Page [45]

Mich. 5 Jacobi Regis.

NOTE; *annates, primitiæ*, and first fruits, are all one; it was the value of every spiritual living by the year, which the Pope, claiming the disposition of all ecclesiastical livings within Christendom, reserved out of every living; and those and impropriations began about the time that Polydore Virgil, lib. 8. cap. 2. saith *Nullum inventum majores Romano Pontifici cumulavit opes quam id quod Annates vocant, qui usus omnino multo antiquior est quam recentiores scriptores suspicantur, & annates more suo appellant primos fructus unius anni: vide Concilium Viennense quod Clemens Quintus indixit pro annatibus.* First fruits, Acts and Monuments 351 & 352. Watson's Clergyman 175, 177, &c. 744, &c. Gibson's Cod. 870 to 912.

These first fruits were given to the crown by 26 H. 8. cap. 3.

Note; Hil 34 Ed. 1. an. 1307. At a Parliament held at Carlisle, great complaint was made of intolerable oppressions of churches and monasteries by William Testa (called Mala Testa) the Legate of the Pope, and principally concerning first fruits, at which Parliament the King by assent of his Barons denied the payment of first fruits of spiritual promotions within England, which were founded by his progenitors and the nobles, and others of the realm, for the service of God, alms, and hospitality; and to this effect he writ to the Pope, and thereupon the Pope relinquished his demand of first fruits of abbies, in which Parliament the first fruits for two years were granted to the King.

Decimæ, id est, the tenths of spiritualties were perpetual, which in ancient times were paid to the Pope, until Pope Urban gave them to R. 2. to aid him against Charles King of France, and others who supported Clement the 7th against him. Tenths perpetual.

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Acts and Mo-
numents 335,
336. an. dom.
1266.

Peter-pence.

And 5 H. 3. by the bulls of the Pope, the church of England began to pay the tenths of all their revenue, as well spiritual as temporal to H. 3. for years; these were given to the King by the said act of 26 H. 8. cap. 6.

Vide Lambert de Prist. Leg. Anglorum, &c. f. 128.^o c. 10. omnes qui habuerint 30 denariat. vivæ pecuniæ in domo suâ, de suo proprio, Anglorum lege dabit denarium Sancto Petro, Vide ibid. inter leges Inæ, fol. 78. cap. 4.

Lambert ib. expositione verbi, monies and Peter-pence; Ina King of the West Saxons granted it to the Pope when he was in pilgrimage at Rome. Camb. Brit. p. 306. saith, that it was Offa the West Saxon King that did grant it: *quære* [but neither King could grant it but for himself only, and his grant could not bind the subject without their consent.]

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High commis-
sion.

Antea 19.
Postea 47, 49,
58, 59.
13 Co. 10, 47.

Hab. Corpus.
Postea 47, 69.

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IN the case of Sir Anthony Roper, who was drawn before the High Commissioners at the suit of one Bulbrook the Vicar of Bentley, for a pension out of a rectory impropriate, of which Sir Anthony was seised in fee: and the High Commissioners sentenced the said Sir Anthony to pay that, which he refused; and upon this they committed him to prison, who in this term by *Habeas corpus* appeared in court, upon the return of which writ the matter did appear: and it was well debated by the Justices, and was resolved, that the said Commissioners had not authority or *commission in the said case, for when the acts of the 27 H. 8. & 31 H. 8. of monasteries had made parsonages impropriate, and other religious possessions lay-fee, although that pensions were saved, yet, as it appears by the preamble of the act of 34 H. 8. cap. 16. those to whom the pensions appertain, had not remedy for the said pensions, &c. And for this there it is provided, that if the farmer or occupier of such possessions shall wilfully deny the payment of any such pensions, portions, corrodiess, indemnities, synod proxies, or any other profits, whereof any Archbishop, Bishop, Archdeacon, or any other ecclesiastical person were in possession at, or within ten years next before the time of such dissolution of any such monastery, &c. that then it shall be lawful for the said Archbishop, Bishop,

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shop, or other ecclesiastical person aforesaid, being so denied to be satisfied and paid thereof, and having right to the thing in demand, to have such process, as well against every such person and persons, as so shall deny payment, &c. as against the church and churches charged with the same, as heretofore they have lawfully done, and as by and according to the laws of this realm they may now lawfully do, &c. And if the King hath covenanted to discharge the patentee, &c. of pensions, and then suit shall be made for the same in the Court of Augmentations, and not elsewhere: then if the High Commissioners will determine of pensions, they ought to do it by the act 34 H. 8. and the said act gives this expressly to Ordinaries, and their officials, and the High Commissioners have their authority by the act 1 El. made a long time after.

But it was objected, that the said act 1 El. gave to the Queen, her heirs, and successors, power to assign commissioners to exercise and execute all manner of jurisdiction spiritual, to visit, reform, &c. all schism and heresy, &c. and enormities, which by any manner of spiritual jurisdiction can, or lawfully may be reformed. And it was said, that such spiritual jurisdiction, which the Bishop should have, is transferred to the High Commissioners.

But it was unanimously resolved by Coke, Walmsley, Warburton, Daniel, and Foster, Justices, that the act 1 El. doth not extend to this case for divers causes, *viz.*

1. For that the said clause of resignation is not more large than the clause of restitution; and that the act of 1 Eliz. doth not take away nor alter any act of Parliament, unless those only which are expressly named in the act: and it was resolved that the High Commissioners cannot hold plea for the double value of tithes carried away before severance, for two causes.

Tithes subtracted. Vide ante.

(1.) For this, that the statute of 2 Ed. 6. cap. 13. gave the cognizance of it to spiritual Judges, which is to be intended of such spiritual Judges who then were.

(2.) Subtraction of tithes is injury and no crime, but concerns interest and property: and for this the High Commissioners cannot meddle with it.

2. For that the words of the act 1 El. are (which by any manner of spiritual jurisdiction can or lawfully may be reformed.) And it appears that these words extend to the crime only, and not to cases of interest betwixt party and party; for the words are: all such errors, heresies, &c. which by any manner, &c. so that (such) and (which) are relatives.

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3. This jurisdiction was given to the Bishops by act of Parliament, viz. by 34 H. 8. which is more temporal than spiritual: and for this out of the precedent words 1 Eliz. viz. spiritual or ecclesiastical jurisdiction, which is to be intended of jurisdictions merely or purely spiritual, * but acts of Parliament are more temporal than spiritual.

4. It was not the intent of the act 1 El. which revived the statute 23 H. 8. cap. 9. by which act it is enacted, that none shall be sued out of his diocese, &c. that the High Commissioners for private causes shall send for subjects out of any part of the realm, and so in effect confound the jurisdiction of the Ordinary, who is an officer and minister so necessary, that in divers cases the courts of the King cannot administer Justice to subjects without him, &c.

13 Co. 9, 47.

5. If the act of 1 Eliz. had extended to give to High Commissioners power to determine *meum & tuum*, as pensions, tithes, legacies, matrimonies, divorces, administrations, probates of testaments, &c. the act would also give the party grieved benefit of appeal, and not give absolute authority to the High Commissioners finally to determine *meum & tuum*, and to bastardise issue, &c. without any controlment, for this should be to dissolve the court of the Ordinary, which is so ancient and inevitably necessary in many cases to the administration of justice, in divers points of it, that without this Justice cannot be executed.

6. The High Commissioners cannot extend themselves but only to crimes, for the clause which gives to them power to imprison, &c. and to punish, &c. and imprison such offender, &c. And (offender) is only to be intended of him who commits any crime, and not of him who detains pensions, legacy, tithes, &c.

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Mich. 5 Jacobi Rot. 2254.

Habeas corpus
returned and
discharged by
judgment of the
Court. Ant. 19,
27, 45. Post. 69,
82, 104, 219.

PRÆCEPTUM fuit guardiano prisonæ domini Regis de le
Fleet, quod haberet hic, viz. apud Westmonasterium
immediatè post receptionem hujus brevis corpus Antonii
Roper

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Roper Militis in prisonâ prædictâ sub custodiâ suâ detenti quocunque nomine censeretur, una cum die et causâ captionis & detentionis ejusdem Antonii: et iidem Justiciarii hic, visa causa illa, ulterius fieri fecerint quod de jure & secundum legem & consuetudinem regni domini Regis Angliæ fuerit faciendum: et modo hic ad hunc diem, scilicet diem Sabbati proximum post octabis Sancti Mich. ista eodem termino venit prædictus Antonius in propriâ personâ suâ sub custodiâ prædicti guardiani ad barram, hic prædict' & idem guardianus, tunc hic mand. Quod ante adventum brevis prædicti, viz. nono die Octob. ultimo præterito prædictus Antonius Roper Miles reducit se prisonæ prædictæ præantea commissus virtute cujusdam warranti, datâ 30 die Junii ultimo præterit', quod sequitur in hæc verba, viz.

These are in his Majesty's name to require and charge you, by virtue of his high commission for causes ecclesiastical, under the great seal of England, to us and others directed, that herewith you receive and take into your custody the body of Sir Anthony Roper, Knt. and him safely detain prisoner at this our commandment, until we shall give order for his enlargement; signifying unto you, that the cause of his commitment is, for that there being a certain cause referred unto us by his Majesty's special direction, betwixt him the said Sir Anthony Roper and John Bulbrook, Vicar of Bentley, for that he detained wrongfully from him the said Vicar, a certain yearly pension due unto him from the said Sir Anthony; and being thereupon called before us, and after full hearing of * the cause in the presence of Sir Anthony and his counsel at three or four several times, he was at the last adjudged by us to pay the said pension, and he having some time of deliberation given unto him by us to consider thereof, hath notwithstanding obstinately disobeyed the said order, and doth so still persist: and this shall be your warrant in that behalf; given at Lambeth this thirtieth of June 1607. *Et quod hæc fuit causa captionis et detentionis, præd' Antonii in prisonâ prædictâ, corpus tamen prædicti Antonii modo hic paratus habet prout per breve prædictum sibi præceptum fuit, &c. super quo, visis præmissis et per Justiciarios hic plenius examinatis et intellectis, videtur iisdem Justic' hic quod prædicta causa commissionis prædicti Antonii prisonæ de Fleet prædict' in retorno prædict', superius specificata minus sufficiens in lege existit ad detinendum prædictum Antonium in prisonâ præd'. Ideo prædictus Antonius a prisonâ præd' per curiam hic dimittitur, ac idem guardianus*

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de hujusmodi custodia per eandem curiam hic plene exoneretur, &c.
And this was resolved *una voce* by Coke Chief Justice, Walmsly, Warburton, Daniel, and Foster Justices, for the causes and reasons afore expressed.

And in the very same term in Lane's case, a Parson in Norfolk, who sued one of his parishioners before the High Commissioners, for scandalizing of him, saying in the church on the Sabbath before all his parishioners, "That he was a wicked man, and an arrant knave:" prohibition lies, for this, that it was not so enormous as the statute intended: note, that by express Proviso, the High Commissioners cannot intermeddle with all heresies, but with exorbitant heresies, &c. and the other shall be determined before the Ordinary.

Justice in WALES not to be by Commission.

Hil. 5 Jacobi.

Justice of Wales
cannot be by
commission but
by patent.
4 Inst. 240.
Postea 52.
1 H. H. P. C.
707.

NOTE; it was moved to the Justices this very term, upon consideration of the acts of 34 H. 8. c. 28. and the 18 Eliz. if the Justices in Wales may be constituted by commission; and upon conference it was conceived they could not, but that it ought to be by patent, as it hath been used ever since the act 34 H. 8. Then it was moved, if the King which now is, may by force of a clause of 34 H. 8. do it, which clause is, that the King's most royal Majesty shall and may at all times hereafter from time to time, change, add, order, alter, minish, and reform all manner of things before rehearsed, as to his most excellent wisdom and discretion shall seem meet: and also to make laws and ordinances for the commonwealth, and good quiet of the said dominion of Wales, and his subjects of the same, from time to time, at his Majesty's pleasure: and it seemed to divers of the Justices, that this power given to the King determined by his death, for divers causes.

1. It wants these words, "his successors," and for this it ought not to be drawn in succession by construction, and that should be against the intention of the makers of the act, for they gave this high power of alteration, &c. of the laws to the King's most excellent Majesty, as to his most excellent

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excellent wisdom and discretion shall be thought most meet ; which words want " his successors : " for as his wisdom and discretion, which they well knew, did not go in succession ; so the power and great confidence which was annexed to them did not go in succession ; and for this, that *eorum progressus ostendunt multa quæ ab initio provideri non possunt* : and what ensues upon this act of the 34 H. 8. concerning this uniting of * Wales and England, and the subjection of them to the laws of England, none could divine : for this cause it was thought reasonable that King H. 8. during his time, might alter them ; that he seeing the obedience of those of Wales, and the good fruit which proceeded out of the said act, never altered any part of it ; but it was never the intention of the said act to give power to the King and his successors for ever, to alter, &c. the laws, so that none of that country could be certain of his life, lands, goods, or liberty, or any thing which he hath, and that would be of great servitude, *misera servitus est, ubi jus est vagum* : also the words are for the commonwealth, &c. if his Majesty's subjects of Wales, at his Majesty's pleasure, &c. by which it appears that the intention of the makers of the act, was to give this power to King H. 8. for his pleasure did determine by his death.

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2. Power of alteration of laws, &c. is a point of high confidence concerning the administration of justice ; and the act by omitting (of his successors) intended to unite this confidence to the person of H. 8. and not to extend it without limitation of time to his successors : and this stands with the construction of law in other cases ; for all commissions, concerning the administration of justice determine by the death of the King, yea he constitutes them *Justiciarios suos*, which authority being in case of administration of justice, determines by the death of the King, or resignation, 1 Ed. 5. 1. 1 H. 7. 1. 14 Ed. 4. 44. yet if the King make a lease *durante beneplacito*, or present one to a church, these are not void by his death, until they are controlled or revoked by his successor : but the office of a Sheriff which is granted, *durante beneplacito*, determines by the death of the King, for this concerns the administration of justice : and upon certificate of the opinion of the Justices, that the Justices of Wales cannot be constituted by commission to the Lord Chancellor, Baron Snigg had a patent for the circuit of Wales, as others had before.

HIGH COMMISSION.

Trin. 6 Jac. 1.

Pursuivant.
Antea 19, 45,
47.
Post. 76, 82, 84.

Simpson's case
before the
Judges of Assize
in Northamp-
tonshire.
42 Eliz.
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See Dent's case,
Rep. Q. A.

THIS term it was resolved *per totam curiam in Communi Banco, viz.* Coke Chief Justice, Walmsley, Warburton, Daniel, and Foster, in the case of Allan Ball, that the High Commissioners cannot by force of the act 1 El. cap. 1. send a Pursuivant to arrest any person subject to their jurisdiction, to answer to any matter before them: but they ought to proceed according to ecclesiastical law, by citation; for the statute of 1 El. did not give them any such authority to arrest the body of any subject upon surmise: and although that it be comprised within their commission, that they may send for any by Pursuivant, &c. yet inasmuch as this hath no foundation upon the act of 1 El. the King by his commission cannot alter the ecclesiastical law, nor the proceedings of it; for the act says, that the commissioners shall exercise, use, and execute all the premises (according to the privileges of the act) according to the said letters patent, *id est*, the letters patent which are mentioned, and authority before, for this is implied within this word (said) and for this, without question, the commission only without the act cannot alter the proceedings of the ecclesiastical law? And in the circuit of Northampton, when the Lord Anderson and Glanville were Justices of assize, a Pursuivant was sent by the Commissioners to arrest the body of a man to appear before them, and * in resistance of the arrest, and striving amongst them, the Pursuivant was killed: and if this was murder or not, was doubted, and this depended upon the validity of the power and authority of the Pursuivant; for if his authority was lawful, then in killing an officer of justice in execution of his office, is murder: and advisement was taken till the next assizes; and upon conference at the next assizes it was resolved that the arrest was tortious, and by consequence that this was not murder: but they may send citation by a Pursuivant, and proceed, if the party make default, to excommunication, and then to have a *Capias excommunicat'*, and to imprison him by the writ of the K. which writ

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writ *de excommunicato capiendo* is prescribed and returnable by the statute of 5 El. which shall be in vain, if they may arrest him by a pursuivant before any answer or default made: and this will be against the statute of *Magna Charta*, and all the ancient statutes, which see Rastall, title Accusation, if a freeman shall be arrested upon a bare surmise or accusation: which statutes, if good and profitable for the weal public, never were intended to be repealed by the said statute of 1 Eliz.

Note, that neither the Star-chamber nor Chancery award any messenger to arrest the body until a contempt made; but first a subpoena, &c. goes.

MARMADUKE LANGDALE's Case.

Vide Postea 58.

IN the case of Marmaduke Langdale of Leaventhorp in the county of York, being sued by Joan his wife, for maintenance before the Bishop of Canterbury, and other High Commissioners: it was resolved *per totam curiam, præter* Walmsley, who doubted of it, that a prohibition, which before was granted, was well maintainable, for this, that it was not any enormity, nor any offence within the statute, but a neglect of his duty, and a breach of his vow of maintenance; also the party shall be defeated of his appeal; and for that reason it belongs to the court of the Ordinary: and the rule of the court was, that the plaintiff shall count against the High Commissioners (for against his wife, being one person in law with him, he could not count) and upon demurrer joined, the case is to be argued and adjudged, upon which the party grieved may have a writ of error, *si sibi viderit expedire*, &c. See more, fol. 58.

High Commission.
Post. 58, &c. B.

The Case of the Lords Presidents of WALES and YORK.

ON Sunday last, my Lord Chief Justice and myself, at Serjeant's Inn in the afternoon, received by the hands of the King's Attorney by commandment, as he signified to us,

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See 4 Inst. 242,
245, 281.
13 Co. 30, 31,
&c.

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us, by your lordships, the said complaints, exhibited to his Majesty by the Lord President of Wales, and the Lord President of York, against the Judges of the realm, with a signification of your Lordships pleasure, that we two should impart the same to the rest of our brethren, which we did on Monday in the afternoon, the forenoon being spent in the public service of the realm, at Westminster: and upon consideration had of the parts of the complaint, we have, as this short time will give us leave, (being daily employed, as well in the courts at Westminster, as some of us for trials of writs of *Nisi prius*,) resolved upon these answers, which we knowing to be warranted by the laws of this realm, doubt not but will be allowed by your Lordships; and do hope that where the Judges of this realm have been more often called before your Lordships, than in former times they have * been, which is much observed, and gives much emboldening to the vulgar, that after this day we shall not be so often upon such complaints, (your Lordships being truly informed of our proceedings) hereafter called before you.

And seeing that my Lord President of York hath now *ore tenus* first opened the cause of his grief more amply and in some cases more particularly, I will begin with those objections that have been made on the behalf of that council, wherein for method, and for avoiding of confusion, I will first speak to the true cause of the institution of that court.

2. That our proceedings in granting of prohibitions, is for the matter justifiable by law.

13 Co. 30, 31.

3. That the manner of our proceedings was respectful and compliant towards the Lord President of York, and the Council there.

4. Give answers to all objections both particular and general.

5. Propose remedies for the time past, if there be just cause.

6. And lastly, remedies for the future, to take away all the causes of opposition between the Judges and both the said councils:

4 Inst. 245.

And first as to the cause of instituting the said court, viz.

After the suppression of all religious houses to the value of two hundred pounds, or under, *anno* 27 H. 8. in the beginning of *Octob.* *anno* 28 H. 8. there was a great insurrection of the Lord Husley, and twenty thousand persons in Lincolnshire, about the cause of religion, against whom Charles Brandon Duke of Suffolk went, and appeased them.

As soon as they were appeased, a great commotion began of forty thousand men of that county, Sir Robert Ask being

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being chief, against whom the Duke of Norfolk went and dispersed them. Soon after in Lancashire began a great rebellion of men of that county, and of Cumberland, Westmorland, and Northumberland; against whom the Earl of Derby was employed, and quieted them: and after that Musgrave, Tilby, and others, began to raise a great number, and assaulted Carlisle castle, whom the Duke of Norfolk overthrew.

Presently after Sir Francis Bigot with a multitude of people, made an insurrection at Ketrington, Leigh, Pickering and Scarborough in Yorkshire; whom the Duke of Norfolk pacified; and soon after the Lord Darcy, Ask, Constable, Bulmer, &c. began a new commotion about Hull in Yorkshire, whom the Duke of Norfolk appeased. And all these rebellions were between the beginnings of 28 and 30 H. 8. within which time many of the rebels were executed *in furore belli*, and *in flagranti crimine*, by martial law, and some attainted by the common law. The King intending the suppression of the greater houses of religion, which anno 31 H. 8. he effected, he established a council there for the quiet of the counties of Yorkshire, Northumberland, Westmorland, Cumberland, Duresme, the counties of the city of York, Kingston upon Hull, and Newcastle upon Tyne, for preventions of riots, tumults, and insurrections, in those counties and places: in this time of necessity and danger, the King did arm the President and Council with two authorities in one commission; the one a commission of *oyer and terminer*, *de quibuscunque congregationibus et conventiculis illicitis, coadjutoribus Lolardiis, imprisonmentibus falsis allegatis, transgressionibus, riotis, routis, retentionibus, contemptibus, falsitatibus, manutenentiis, oppressionibus, violentiis, extortionibus et aliis malefactis, offensis, et injuriis quibuscunque, per quæ pax & tranquillitas subditorum nostrorum comitatibus, civitatibus, et villis prædictis gravat*, &c. *secundum legem et consuetudinem regni nostri Angliæ vel aliter secundum sanas discretiones vestras audiendum et terminandum.*

4 Inst. 245.

The other authority was, *nec non quascunque actiones reales, seu de libero tenemento, et personales, causasque debitorum et demandorum quorumcunque * in com*, &c. *prædictæ quando ambæ partes vel altera pars sic gravata paupertate gravata fuerit, quod commode jus suum secundum legem regni nostri aliter prosequi non possit, similiter secundum leges et consuetudines regni nostri Angliæ vel aliter secundum sanas discretiones vestras.* And this is all the authority that the President and Council had first expressed in their

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their patents, without any private instructions : and this appears by the commission under the great seal, 31 H. 8. 6 *Pars. Roberto Landavenfi Episcopo Præsidenti Concilii, & aliis;* out of which charter these things were observed, viz.

1. That the final intention of the commission was, *quod pax et tranquillitas subditorum præserventur.*

2. That they hear and determine riots, routs, &c. according to law, or their discretions, which authority by discretion was added, *ad faciendum populum* : for it was resolved without question, that in such cases they had not power but to proceed according to law, for that is *summa discretio*, and not according to their private conceits and affections, *quia talis discretio discretionem confundit* ; so the other clause concerning real and personal actions in all the counties of York, Northumberland, Cumberland, Westmorland, Duresme, and the towns aforesaid was only *ad faciendum populum*, for this was utterly void in law. For,

1. No such general authority granted, may be made by the commission of the King, to hear and determine all real actions within such a county according to law, as he may by charter within a certain county or particular place, for the King by commission may give power to determine criminal causes between the King and the party *secundum legem et consuetudinem Angliæ* ; but he cannot give power by commission to determine causes between party and party : as it was resolved in Scrogg's case, *anno 2 Eliz. fol. 175. in Dyer. Vide Dyer 236.* But the King by his letters patent may grant to such a corporation in such a town *tenere placita realia, personalia, & mixta* ; and none by this can have any prejudice, for the proceeding ought to be according to law ; and if they err, the party grieved may have his writ of error ; but the crown cannot grant to them a court of equity for the cause aforesaid ; and for this cause, that such a Judge should be without controlment : and it was said, that if such commissioners cannot determine felonies, or other criminal causes by writ, but by commission ; so cannot any determine private causes betwixt party and party by commission, but by writ, by the statute of *Magna Charta, cap. 12. & West. 2. cap. 30. Recognitiones de nova disseisina, &c. non capiuntur nisi in propriis comitatibus* : which act gives authority to Justices of assise in their proper counties, by which it appears, that without an act of Parliament, the King by his letters patent cannot put and authorise Justices *de assisis capiendis*, to take them within another county : and for this the ancient precedents and proceedings of law ought not to be altered. As a Justice
of

Antea 48.

2 Inst. 24. 422,

423.

4 Inst. 158.

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of the one bench, or of the other, ought to be made by commission, and not by writ, and yet he may be discharged by writ, 5 Ed. 4. 32. But Justices in Eyre are by writ, as it appears Q. by Bracton, lib. 3. cap. 11. and Britton, fol. 1. Also by the statute of West. 2. cap. 30. and of York, cap. 4. Justices of *Nisi prius* give judgment in assises of *Darrein presentment*, and *Quare impedit* in such a county, which cannot be done without patent. *Et sic de cæteris*.

Also it was observed, that at the first the said commission concerning actions between party and party, extended only when both the parties, or one of them, were so poor, as they were not able to prosecute at law: also by the first institution they had no power to grant injunctions. And lastly, * their Page [53] commission was patent under the great seal, and inrolled in Chancery: and thus much was said for the first, concerning the true cause of the institution of the court, viz. For preventing of tumults and rebellions, and when it began.

2. As to the second point, the granting of writs of *Habeas corpus*, and prohibitions, is justifiable by law; for whereas at the first their authority was patent, it is now private; for the letters patent do refer unto certain instructions which are no where of record, but kept in private, and as it was feared, for private respects, *et de non apparentibus et non existentibus eadem est ratio*; besides the danger to the subject is great, for if they lose their instructions (as it hath happened heretofore) all is *coram non iudice*: and this first reason is drawn from the instructions themselves: the second reason is drawn from the contumacy of the party that supposeth himself to be grieved by the prohibition, and against whom it is granted; if the authority of the Council be never so good, yet being a late and particular jurisdiction, the party must of necessity plead it, so as it may appear unto us judicially; for as we are Judges of record, so must we be informed of record, and never yet hath any party prohibited moved in court to have a consultation, by which might be set forth the jurisdiction of that court and council, so as the granting of prohibitions hath been just; and the fault (if any be) in the parties themselves, that never hitherto made their cause known, as it ought to be by law, to the court.

The third reason is drawn from the great injury offered to the defendants, for it is a true rule, *misera servitus ubi jus est vagum aut incertum*: the defendants, by law, may in all courts plead to the jurisdiction of the court;

2 Salk. 512.
Plea to the jurisdiction. See
Inst. Leg. 484.
to 488.

court; but how can they do so when no man can possibly know what jurisdiction they have: concerning matters of state, which are *arcana imperii*, it is meet they should be kept *sub sigillo concilii*, and in secret; but for jurisdiction between party and party, for deciding of *meum & tuum*, God forbid they should not be known to them, who are to be judged by them; but the keeping them in such secrecy bewrayeth, that the council are afraid that they would not be justified if they were known: and it was concluded again, *misera servitus ubi jus aut vagum aut incertum*.

3. But our proceedings herein have been respectful; for a jury of officers and attornies of our court, being according to an ancient custom, time out of mind of man used, sworn to prevent amongst other things and articles, all defaults of officers and ministers in not executing the writs and process out of this court, and all impediments and hinderances whatsoever of the due proceedings of this court, whereby justice cannot be administered: and finding upon their oaths divers unjust and undue impediments of the proceedings of this court, by the said council in particular: and thereupon a motion being made in open court in Michaelmas term last, by the King's Serjeant Philips, of many intolerable grievances of the subjects offered by the said Council, to many of his Majesty's subjects, in derogation of the King's laws, in prejudice of the King's profits, in hinderance of the due proceedings of this court, prayed the court, according to law and justice, to grant several prohibitions in all those several causes, which we could not deny; but yet thought fit before we granted the same, that there might be a good correspondence between both courts; we should confer with Sir Cuthbert Pepper, Attorney of the Wards, and one of that Council, to let him understand the particular grievances and oppressions, and to hear what he could say in the justification thereof; who accordingly upon motion came to us to Serjeant's Inn, with * whom we conferred, and signified to him the particulars of the said grievances, who would not take upon him to justify the same in no sort, but said, he would acquaint the President and Council therewith, and return their answer; which for that it was neglected, we upon further motion in court granted prohibitions, as in justice we ought, which course and order of proceedings we hold to be respectful and comely toward the Lord President and Council.

4. It was objected, that more prohibitions have been granted of late than in many years before, whereunto a sixfold answer was made.

1. That

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1. That they had exceedingly multiplied the number of causes, so as they have above two thousand depending at one time, and having but five counties and three towns; at one sitting there were about 450 causes at hearing; whereas the Chancery that extends into 41 counties English, and 12 in Wales, in all 53, had in Easter term but 95 to be heard, and in Trinity term but 72; so as if they multiply their causes so infinitely above what were at the first, it is no wonder if the number of prohibitions be increased.

2. Besides the multiplication they have innovated and taken upon them to deal in causes which we know never any President could, and we think never any President and Council did usurp: as first, suits upon penal laws, and many of them limited to the courts at Westminster, but all of them without question out of their jurisdiction; as for example, between Harrison and Thurstone in English bill, upon the statute 39 Eliz. of tillage; whereas the very statute giveth jurisdiction to certain special courts: the defendant pleaded to the jurisdiction, whereupon an attachment was awarded against him, and fined.

And in the case of Hartley after indictment of forcible entry and restitution, according to the statute, he was upon an English bill dispossessed by the President.

3. And after a recovery in an *Ejectione firmæ*, and execution by *Habere facias possessionem* out of our court, they upon an English bill dispossessed the plaintiff, and this was Hart's case. Between Jackson and Philips, after judgment in our court, suit there by English bill. Between Stanton and Child, after execution in debt by process out of our court they commit the plaintiff, an old man and lame. So between Binns and Collet, after the defendant was outlawed in an action of battery.

4. They admit English bills in the nature of writs of error, and of *Formedons*, and other real actions.

5. They will admit of no plea of outlawry in disability of the plaintiff.

6. They usually granted injunctions to stay the common law, which is utterly against law, and sometimes to stay suits in Chancery, and in the Exchequer-chamber; and many other proceedings which are against law and reason, to the great oppression and grievance of the subject: and so in respect as well of the multiplication of suits, as innovations of others, it may very well be, that more prohibitions and *Habeas corpus* have been granted of late than were in times past; and yet there have been more granted, and more ancient than is supposed;
for

Note.

for Mich. 7 Eliz. Rot. 31. upon a motion made by Carus, the King's Serjeant, a *Habeas corpus* was granted out of the King's Bench, for the body of John Lamburn, *alias* Lambert, which writ being returned, that he went to the castle of York, where John Lambert was a prisoner, and that one Oswald Wilkinson the Gaoler refused to deliver him, without the leave of the Archbishop of York, President of the Council there; whereupon he went to the * Archbishop, and shewed unto him the Queen's writ of *Habeas Corpus*, whereunto the Archbishop answered, that John Lambert was not the Sheriff's prisoner, but was committed by him and the Council to the Gaoler's custody, and therefore he should not be delivered; and therefore he sent one Morgan his Secretary to the Gaoler, that he should not be delivered; and thereupon, as well for the contempt in the Archbishop and the Gaoler, as for the insufficient return in not having the body, Carus, the King's Serjeant moved for an attachment against the Archbishop of York and Wilkinson the Gaoler, for the contempt returned by the Sheriff; and it was granted; and the Sheriff was amerced, for that he shewed no lawful cause, Mich. 7 & 8 Eliz. *in libro de Habeas Corpus*. John Dawson in prison for a riot, by English bill, before the President and Council of York, removed by *Habeas Corpus* and delivered; for no man ought to be convicted for a riot, but by indictment, trial, or other due process at law, and there are many other like writs of later time, Pasch. 12 Eliz. *in libro de Habeas Corpus*, Thomas ap Morgan committed by the Council and President of Wales, &c. and this court finding the cause unjust, bailed him, &c. And in Trin. 20 El. *ibid.* the like writ for the body of John Rowland, committed by the President and Council of Wales, and finding by the return that the commitment of him was against law, he was discharged by the court, and many more of that nature.

3. The Judges never grant either prohibitions or *Habeas Corpus*, but upon motion or complaint by the party grieved, so as if the parties have greater cause of complaint than they had in times past, there must of necessity be more writs of prohibition and *Habeas Corpus* granted than was heretofore.

4. The proceedings before the President and Council are by absolute power, their decrees uncontrollable and final, and more final than a judgment in a writ of right; for thereupon a writ of error lieth; but these sentences are irreversible, which makes them adventure, and presume too much upon their authority, and which tends to the great oppression and grievance of the subject.

5. These

Part XII. of WALES and YORK.

5. These suits grow to be more prejudicial to the King than ever they have been, for by the multiplication and innovation of suits, as well real as personal, the King loseth his fines, &c.

6. Remedy for the time past, if we have erred in judgment, a writ of error lieth in the King's Bench; if the King's Bench doth err, a writ of error lieth in the upper house of Parliament, where the King and the Lords are only judges.

3dly, For the time to come, first, that the instructions be inrolled in the Chancery, whereunto the subject may have access, and know their jurisdiction. 2. That the Presidents and councils have some counsel learned in the court, who may inform us judicially of their true jurisdiction, and we will give a day to them before we grant any writ, to shew cause to the contrary; so as justice upon hearing of both sides shall be done; and if we err, the law hath provided a remedy by a writ of error, and no other course can be taken: and we are sworn both to maintain the King's prerogative, and to do justice to all men, according to the laws and customs of England: so, as command, my Lords! whatsoever it shall please you that lieth in our power, and which by our oath we may perform, and we will most willingly obey it: and that which a great divine said to God Almighty, we say unto your Lordships, who sit in God's seat, *da Domine quod jubes, & jube quod vis, &c.*

* The particular cases set down in the petition are answered in the second part of our proceedings justifiable until they plead their jurisdiction, and make it appear to the court to be lawful. Concerning the jury of attornies, it hath been answered before; and for the motion to have a rule set down, &c. it was moved by the King's Serjeant, and we advised thereupon. When this had been thus delivered, by way of answer, Bacon, the King's Solicitor offered to reply; but after the Judge had spoken in the name of all his brethren, the Lords would not suffer him to speak after the Judge: but all others being desired to retire into the next chamber, the Lords had long and prudent conference amongst themselves; and after, we were called in again, and then the Earl of Salisbury, Lord Treasurer, by the consent of that honourable table, gave this resolution: Page [563]

" 1. That the instructions should be recorded for so much
" as concerned either criminal causes, or causes between
" party and party: as for matter of state, if any be, the
" same not to be published.

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" 2. That

2. "That it was necessary that both councils should be within the survey of Westminster-hall, viz. the courts of Westminster.

3. "The motion was well allowed, that the Presidents and councils should have counsel learned in every court; and that upon motion made in open court, upon any prohibition, to either of them, day should be given to shew cause, &c.

4. "The Lord Treasurer repeated the sentence, and said, that true it is, *ubi lex aut vaga aut incerta, miserrima est servitus*, where men's estates and fortunes should be decided by discretion.

"And concerning the remoteness of the place, what reason should there be at this time more for those parts than for the counties of Cornwall and Devon, which are more remote than York? And this was the end of this day's work."

The Case of Heresy.

Heresy, upon conference with Sir John Popham and others, anno 43 Eliz. Vide Post. 93. 1 Hawk. c. 2. Sect. 1, 2, 3, &c. ch. 3. sect. 2.

THE Archbishop and other Bishops, and other the clergy, at a general synod or convocation might convict an heretic by the common law. But for this, that it was troublesome to call a convocation of the whole province, it was ordained by the statute of 2 H. 4. cap. 15. that every Bishop in his diocese might convict heretics; and note, 2 Mary, Brook, title Heresy, *per omnes Justitias*, and Baker Chancellor of the Exchequer, and Hare Master of the Rolls, by that statute. And if the Sheriff was present, he might deliver the party convicted to be burnt, without any writ *De heretico comburendo*; but if the Sheriff be absent, or if he be to be burnt in another county, then there ought to be a writ *De hæretico comburendo*: and that the common law was such, *vide lib. intra*, title Indictment, p. 11. such who there are taken for heretics, some of them, are consonant to true religion. *Vide* 11 H. 7. Book of Entries, fol. 3. 19. See Doctor and Student, lib. 2. cap. 29. Cofin 48. 2. See the statute of 1 & 2 P. & M. cap. 6. That Ordinaries wanting authority to proceed against heretics, 3 F. N. B. 8. fol. 269. And the writ in the Register, which in the new book is omitted, proves

proves this directly. 4. Bracton, lib. 3. cap. 2. folio 123, 124. *Concilio Oxoniensi quidam Diaconus convictus fuit de apostasia, sed primo degradatus fuit per Ordinarium*: and true it is, that every Ordinary may *convent any heretic or schismatic before him, *pro salute animæ*, and may degrade him, as Bracton saith, and may enjoin him penance according to the censure of ecclesiastical law; but upon such conviction at common law, the party convict shall not be burnt, nor any writ *De hæretico comburendo* lieth upon it; for the common law will not commit the decision of a heresy, for the life of a Christian man, to any sole Judge. Page [57]

The makers of the act of 1 Eliz. were in doubt what shall be adjudged heresy; and therefore if any person be charged with heresy before the High Commissioners, they have no authority to judge any matter or cause to be heresy, but only such as hath been so adjudged by the authority of canonical scripture, and by the four first general councils, or by any other general council, wherein the same was declared heresy by the exprefs and plain words of canonical scripture, or such as shall hereafter be determined to be heresy by Parliament, with the assent of the convocation; for so it is expressly provided by the said act of 1 Eliz. And although this proviso extends only to the high Commissioners, yet seeing in the high commission there be so many Bishops, and other divines and learned men, it may serve for a good direction to others, especially to the diocesan, being a sole Judge in so weighty a cause.

At this day the diocesan hath jurisdiction of heresy, and so it hath been put in ure in all Queen Elizabeth's reign, but without the aid of the act of 2 H. 4. cap. 15. the diocesan could imprison no person accused of heresy, but was to proceed against him by the censures of the church; for the Bishop of every diocese might convict any for heresy before the statute 2 H. 4. as appears by the preamble of it. But could not imprison, &c. and now seeing that not only the said act of 2 H. 4. but 25 H. 8. cap. 14. are repealed, the diocesan cannot imprison any man accused of heresy, but must proceed against them as he might have done before those statutes by the censures of the church; as it appears by the said act of 2 H. 4. cap. 15. Likewise the supposed statute of 5 R. 2. cap. 5. And the statutes of 2 H. 5. cap. 7. 25 H. 8. cap. 14. 1 & 2 P. & M. cap. 6. are all repealed, so as no statute made against heretics stands now in force; and at this day no person can be indicted or impeached for heresy

See Cotton's Records 285. That this statute was never assented to by the Commons, and therefore the King at their prayer revokes it by a statute 6 R. 2. But yet the power of the Prelates was such (as Mr. Rymer observes in his MS. of Parliamentary proceedings (p. 149) That the Statute of Repeal was never formed into an act, or published, so as the former ordinance continued to be enforced by the clergy (whereby many godly men were cruelly burnt) till it was repealed by a special act of Parliament 1 Ed. 6.

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before any temporal judge, or other that hath temporal jurisdiction, as upon perusal of the said statute appeareth.

There was a statute supposed to be made in 5 R. 2. that commissions should be by the Lord Chancellor made and directed to Sheriffs, and others, to arrest such as should be certified into the Chancery by the Bishops and prelates, masters of divinity, to be preachers of heresies and notorious errors, their factors, maintainers, and abettors, and to hold them in strong prison, until they will justify themselves to the law of the holy church. By colour of the supposed act, certain persons that held that images were not to be worshipped, &c. were holden in strong prison, until they (to redeem their vexation) miserably yielded before these masters of divinity to take an oath, and did swear to worship images, which was against the moral and eternal law of Almighty God. We have said by colour of the said supposed statute, &c. not only in respect of the said opinion, but in respect also, that the said supposed act, was in truth never any act of Parliament, though it was entered in the Rolls of the Parliament, for that the Commons never gave their consent thereunto. And therefore in the next Parliament, (though it was entered in the Rolls of the Parliament) for that the Commons never gave their consent thereunto, therefore in the next Parliament, the Commons preferred a bill, reciting the said supposed act, and constantly affirmed, that they never assented thereunto, and therefore desired that the said supposed statute might be aniented and declared to be void; for they protested, that it was never their intent to be justified by, and to bind themselves and successors * to the prelates, more than their ancestors had done in times past; and hereunto the King gave his royal assent in these words, *Pleist au Roy*. And mark well the manner of the penning of the act, for seeing the Commons did not assent thereunto, the words of the act be, "it is ordained and assented in this present Parliament, that," &c. And so it was, being but by the King and the Lords. [Or rather, by the craft of the Bishops and the then Chancellor.]

It is to be known, that of ancient time, when any acts of Parliament were made to the end the same might be published and understood, and especially before the use of printing came into England, [after the Parliament was ended] the acts of Parliament were ingrossed into parchment and bundled † up together with a writ in the King's name, under the great seal, to the Sheriff of every county, sometimes in Latin, and sometimes in French, to command the Sheriff to proclaim the said statutes within

† Note, this method gave opportunity to the Chancellors and Bishops to insert in the said bundles several things as acts of Parliament, which never passed in Parliament. W. B.

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his bailiwick, as well within liberties as without. And this was the course of parliamentary proceedings, before printing came in use in England, and it continued after we had the print till the reign of H. 7.

Note, at the Parliament holden in 5 R. 2. John * Braibroke, Bishop of London, being Lord Chancellor of England, caused the said ordinance of the King and Lords to be inserted into the parliamentary writ of proclamation to be proclaimed amongst the acts of parliament, which writ I have seen, the purpose of which writ, after the recital of the acts directed to the Sheriff of N. is in these words. *Nos volentes dictas concordias, sive ordinationes in omnibus & singulis suis articulis inviolabiliter observari, tibi precipimus quod prædictas concordias sive ordinationes in locis infra balivam tuam, ubi melius expedire volueris, tam infra libertates, quam extra, publicè proclamari & teneri facias juxta formam prænotatam. Teste Rege apud Westm. 26 Maii anno regni Regis, R. 2. 5.*

But in the parliamentary proclamation of the acts passed in anno 6 R. 2. the said act of 6 R. 2. whereby the said supposed act of 5 R. 2. was declared to be void, is omitted, and afterwards the said supposed act of 5 R. 2. was continually printed, and the said act of 6 R. 2. hath by the craft of the prelates been ever from time to time kept from the print.

Certain men called Lollards were indicted for heresy upon the statute 2 H. 4. for these opinions, viz *Quod non est meritum ad Sanctum Thomam nec ad Sanctam Mariam de Walsingham pręgrinari. 2. Nec imagines crucifixi et aliorum sanctorum adorare. 3. Nulli sacerdoti confiteri nisi soli Deo, &c.* Which opinions were so far from heresy, as the makers of the statute of 1 Eliz. had great cause to limit what heresy was.

* He was made Chancellor in Sept. sexto R. 2. But Sir Richard Scroop, Knight, the preceding Chancellor being exauſterated in July, the King by Delapool and Braibroke's advice took the seal into his own hands. Vide Hall, 440. Cantol. Canc. 51.

Nota, Sir Michael Delapool succeeded Braibroke being made Chancellor in March sexto R. 2. See Cotton 194. 198, 290. Hollinsh. 457, 422, &c.

[Vide Post. 93. of the writ *De hæretico comburendo.*]

LANGDALE's Case.

Antea, p. 50.

Mich. 6 Jac. Regis.

Prohibition.

High commis-
sion.

Vid. post. 76, 77.
4 Inst. 99, 100.

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4 Inst. 99.

IN the case of Langdale in this very term, in a prohibition to the High Commissioners, two points were moved, the one, if a feme-covert may sue for alimony before the High Commissioners; the other, if the court of Common Pleas may grant a prohibition, when no plea is pendent in the Common Pleas: as in this case no plea can there depend betwixt husband and wife. And forasmuch as this concerns the jurisdiction of the court, this was first of all debated; and divers objections were made against it.

1. That this court hath not jurisdiction to hold plea without an * original, unless it be by privilege of an attorney, officer, or clerk of the court, unless that it be in an especial case, viz. when there is an action there depending for the same cause; then it was agreed that a prohibition shall be awarded out of the Common Pleas, in respect that the court hath an action there depending for the same cause, and so being possessed of the cause, it gave the court jurisdiction to award prohibition out of the same court: and for that the prohibition ought to recite, *quod cum tale placitum pendet, &c.* and the defendant, *pendente placito prædicto*, hath pursued in court-christian: and with this accords F. N. B. 43. g. where it is said, that if a man be sued in the Common Pleas for a trespass, if the plaintiff also sue in court-christian for the same cause, the defendant may sue for this in the Common Pleas, and shall have a prohibition then directed to the Judges: and so always when the matter is pendent in the Common Pleas, if suit be for the same cause in court-christian, he shall have a prohibition: but a man shall have a prohibition out of the Chancery or King's Bench upon his surmise, surmising that he is sued in court-christian for a temporal cause: and 2 Ed. 4. 11. 6. was cited, where it is held that *ne admittas*, which is a prohibition, doth not lie unless that the *Quare impedit* be pendent.

But

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But it was answered and resolved by Coke Chief Justice, 4 Inst. 99, 100. Warburton, Daniel, and Foster, Justices, that the Common Pleas may award a prohibition, although that no suit be there pendent, for this, that the Common Pleas is the principal court of common law for common pleas: for it belongs to the jurisdiction of the Common Pleas to determine all common pleas.

Communia placita non sequantur curiam nostram, as it is enacted by *Magna Charta*, which hath thirty-two times been confirmed by other acts of Parliament: then if the ecclesiastical judges inroach upon the jurisdiction of the Common Pleas to hold plea of any thing against the common law of the land, or of any thing triable by the law, there the principal court of common law shall grant a prohibition, and that without original writ, for divers causes.

2 Inst. 21, 550.
Proeme to
2d Inst. p. 4.

1. For that no original writ of prohibition which issues out of the Chancery is returnable either into the King's Bench or Common Pleas, but is directed to the Judge or party, or both, and is not returnable at all: but it appears in the Register, that if the prohibition be contemned, then the Chancellor may award an attachment to punish this contempt, returnable either in the Common Pleas, or in the King's Bench: but an attachment in such case is but as a judicial writ; and this appears by the Register, fol. 33. And if the attachment in such case be returnable into the Common Pleas, &c. the plaintiff in the declaration shall make mention of an original writ in the Chancery, and of the contempt, &c.

Writ of prohibition not returnable.

2. There was great reason that no original writ of prohibition shall be returnable, for the common law was a prohibition in itself, and he who did inroach upon the jurisdiction of it incurred a contempt: and with this agree our books, as 9 H. 6. 56. in attachment upon a prohibition in the Common Pleas, before William Babington then Chief Justice of the Bench, concerning a suit in court-christian of tithes of gross trees: and there Fulthorp the Serjeant took exception to the count, for this, that the plaintiff in his count did not declare upon any statute, nor that any prohibition, *scil.* original writ, was directed unto him: and there it is held that the statute of 45 E. 3. and the common law also was a prohibition in itself: and thus the rule of the book, 19 H. 6. 54. prohibition for this, that one had sued in a court-baron against the common law; * and there Ascve said, the statute is a prohibition in itself, so it is held in 8 R. 2. title *Attachment sur Prohibition*, 15. Note by Clopton in the Common Pleas,

The common law is a prohibition.

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who then was a Serjeant, that if a plea be held in court-christian, which belongs to the court of the King, without any prohibition *in facto*, the plaintiff shall have an attachment upon a prohibition, for this, that the law is a prohibition in itself; for by the law they ought to hold no plea, but that which doth belong to their jurisdiction, *quod fuit concessum, &c. Register 77. Estrepment. Præcipimus quod inhibeas, &c. Fitz. N. B. 259. Register 112. Superfedeas* to a court-baron, for holding plea *vi et armis*, for above forty shillings: and F. N. B. a writ of consultation is as much an original as a prohibition, yet the Common Pleas hath granted infinite consultations; *ergo* prohibitions, *qui habet jurisdictionem absolvendi, habet jurisdictionem ligandi*; and one writ is as original as the other.

Several kinds of prohibitions.

Note, there are several writs of express prohibitions, *scil.* prohibitions with this word, *prohibemus vobis*, and letters in nature of prohibitions, as *Superfedeas*, by which it is commanded, *quod superfed' in placito prædi&c'*. And an injunction is a prohibition also in its nature, for the words are an injunction to the party, not to the Judge; and a *Superfedeas* is to an officer or judge, not to the party.

Express prohibitions are in two manners, the one founded upon a suggestion, the other upon record; upon suggestion where no plea is pendent, but the suggestion is the foundation, for it is not so when a plea is pendent; upon record when a plea is pendent. Prohibitions founded upon record, as *ne admittas, &c.* ought to recite the plea pendent, for all those which are founded upon record ought to recite a plea pendent. So a writ to the Bishop to admit a clerk, is a judicial *latitat*, as Dyer defines it: and as to the book of 2 Ed. 4. it is well agreed, that this doth not lie in the Common Pleas, unless a *Quare impedit* be depending; for this ought to recite a writ to be depending; and it should be against reason to restrain any to present, or to make waste by *Estrepment*, unless that a writ be pendent: and as to the opinion of Fitzherbert, it was affirmed for good law, for every one agrees it, that if a plea be pendent in the Common Pleas, then a prohibition there lies, and the pendency or not pendency of a plea is not material for divers causes.

Pendency of plea, &c. not necessary.

1. The pendency of a plea may give a privilege to the party, but no jurisdiction to the court in collateral suit: and there is a diversity betwixt privilege to the party, and jurisdiction of court, for a plea pendent may give privilege to the party, *eundo, redeundo, et morando*, but doth not give jurisdiction to the court to hold plea by bill by col-

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collateral suit against any other, as an officer, attorney, or clerk may.

2. The prohibition in such a case where plea is pendent is no process judicial upon the record, for it is a collateral suit.

3. If the Common Pleas, which is the proper court for common pleas, cannot grant a prohibition without a plea pendent; certainly the King's Bench, which holds plea of common pleas, by secondary means, cannot do it: and so the Archbishop of Canterbury in his articles concerning prohibitions, holds that neither the one court nor the other may grant prohibitions in such a case: but inasmuch as the common law is instead of an original, as hath been said, both * courts may grant it.

* See Vaugh.
157, 209.

4. Infinite precedents may be shewn of prohibitions out of the Common Pleas, without recital of any plea pendent, as is agreed on the other part: and true it is, that it ought not to be so, if the court hath not jurisdiction * to grant any without plea pendent. * Every petty clerk of the common law shall have by his privilege a prohibition without plea pendent; *a fortiori* the common law itself may prohibit any one, who against the common law shall inroach upon its jurisdiction, and enquire of things done against the jurisdiction of the court. Plea pendent is cause of privilege and not of jurisdiction, 4 Ed. 4. 37. 37 H. 8. 4. Action or information upon the statute of 2 H. 5. c. 5. is but an information to the court of wrong done to the common law, for this, that no original writ lies, as upon penal law, upon *malum prohibitum*, this is, *malum in se*, *de quo curia intelligi & informari voluit*.

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5. A precedent is in 22 Ed. 4. where a prohibition was granted out of the Common Pleas, for that the plaintiff might have a writ of false judgment at the common law: the record itself agrees with the report.

Vaugh. 333,
342, &c.
Antea 30.

6. Officers and clerks, as well in the Common Pleas as in the Exchequer, and farmers of the King in the Exchequer, may have by privilege of court a prohibition without original; *a fortiori* the law itself shall have greater privilege than an officer or clerk, and certainly to enforce the party to bring an action, will be a means to multiply suits to no end, for the law itself in 4 Ed. 4. fol. 37. if any man upon the statute of 2 H. 5. for not delivering of a libel, he brought into the Common Pleas; and if he cannot have a prohibition without such suit this shall be a cause, as hath been said, to multiply suits, and is against the public weal: for he will bring his action upon the statute before that he will be deprived of his prohibi-

Stat. 2 H. 5. c. 3.
See 13 Co. 42.
10 Co. 75. b.
3 Bull. 5. 120.
Cro. Jac. 37,
388.
Moor 756.
Regr. 58.

prohibition, and by that he gives himself cause of prohibition; every prohibition is as well at the suit of the King as of the party, as is held in 28 Ed. 3. 97. false Latin shall not abate, nor excommunication in the plaintiff is no plea: for this is the suit of the King, as well for his jurisdiction as for the party, who by law may chuse his court, 15 Ed. 3. title Corrody 4. The King may sue for this contempt where he pleaseth.

Note, that although the original cause was in the King's Bench for corody, excommunication is no plea in disability of the plaintiff, because it is the suit of the King for contempt to his law. *Vide* 21 H. 7. 71. Kelway 6. in *Quare non admittit*, 4 Ed. 4. 37. for not delivery of a libel, in the Common Pleas, and then he shall have a prohibition by all the Justices: so upon the statute of 2 Ed. 6. cap. 13. for suing for tithes where there is a prescription, &c. and this shall be to introduce multiplication of suits, when himself gives cause of prohibition, 38 H. 6. 14. 22 Ed. 4. 20. 13 Ed. 3. title Prohibition 11. After a judgment in the Common Pleas, after which the patron sues the recoveror in Chancery, surmising equity, attachment upon a prohibition out of the Common Pleas, yet no plea pendent.

Note, the reporter reporteth this attachment to issue out of the Common Pleas, for the Chancellor would not prohibit him.

32 H. 6. 34. An attorney in the palace assaulted and menaced, the court shall take a bill and enquire of it, 4 Ed. 4. 36, 37. there a prohibition without view of libel, for this, that action was pendent. Statham, Prohibition 3.

Prohibition super articulos, title Prohibition, plea 5. gives a prohibition before, *scil. coram Justiciariis nostris apud West.* *Vide* F. N. B. fol. 69. b. in a writ of *Pone, Register Judic' coram Justiciariis nostris apud West.* is the Common Pleas, F. N. B. 64. d. 38 Ed. 3. 14. stat. 2 Ed. 6. cap. 13. such courts grant prohibition who have used to grant them: Hale's case in * my Reports. Note, the reason that many prohibitions were granted in the King's Bench, for that nowrit of error lies but in plaints.

BANKS's Case.

Mich. 6 Jac. 1.

MICH. 6 Jac. Rot. 639. Robert Banks, Gent. brought an action upon the statute of Winton, 13 Ed. 1. against the inhabitants of the hundred of Burnham in the county of Bucks, and counted, that certain misdoers to the plaintiff unknown, at Hitcham in the county aforesaid, which town is in the hundred of Burnham, the 22 Nov. anno regni Regis Jacobi 5. assaulted the plaintiff, and robbed him of 25l. 3s. 2d. *ob.* and that the plaintiff immediately after the robbery, *scil.* the 22d of Nov. at Joplow and Manlow, in the county aforesaid, which were towns next the said town of Hitcham, within the said hundred, made hue and cry of the said robbery, and gave notice of the said robbery to the inhabitants of the said towns of Joplow and Manlow, and after the said robbery, and within twenty days before the purchase of the writ, *scil.* 19 day of Feb. anno 5. at Dorney in the county aforesaid, the plaintiff, before Sir Wm. Gerrard, Knt. then Justice of Peace within the same county, an inhabitant next to the said hundred, being examined upon his oath, according to the statute of 27 El. the plaintiff upon his oath said, that he did not know the parties who did rob him, nor any of them: and since the said robbery are forty days past, and the inhabitants of the said hundred of Burnham have not made amends of the said robbery to the plaintiff, nor the body of the felons and misdoers aforesaid, nor any of them have taken, nor answered their bodies, nor the bodies of any of them, but have suffered the felons to escape. To which the defendants plead (not guilty) and a *Venire facias* was awarded to the Sheriff, *de vicineto* of the hundred of Stoke, which is the hundred next adjacent to the said hundred of Burnham: and the jury gave a special verdict; they found that the plaintiff was robbed, and that he made hue and cry in manner and form, as he hath counted, and found over, that the plaintiff was sworn before the said Sir William Gerrard, then being a Justice of Peace within the same county, and an inhabitant next unto

Sur statute Winton. Hue and cry. See 1 Show. 60.
1 Show. 150.
7 Co. 6, 7.
Farr 153, 160.
Cro. Car. 267.
1 Hawk. ch. 76.
Sect. 3. 26.
2 Hawk. c. 12.
Sect. 5, 6.
2 Sand. 379,
380, 423.
2 Salk. 614.
Farr 157, &c.
Rep. Q. A. 8,
9, 10, &c.

to the hundred of Burnham, and said upon his oath in these English words, " that he, on Thursday being the two and " twentieth day of November 1608, riding under Hitcham " Wood, in the parish of Hitcham, within the hundred of " Burnham, was then and there set upon by two horsemen, " which then, nor at this present he did, nor doth know, and " by them robbed and spoiled of the just sum of 25 l. 3 s. 2 d. " *ob.* not without great danger of his life : " but whether the said oath so taken is true, according to the form and effect of the said act of 27 El. and according to the count, the jurors pray the direction of the court.

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* M O U S E's Case.

Mich. 6 Jacobi 1.

Injuria, pro bo-
no publico.

See 1 Danv. 13.

Molloy 246,

247.

2 Bulst.

Allen 93.

1 Sal. 35.

IN an action of trespass brought by Mouse, for a casket, and a hundred and thirteen pounds, taken and carried away, the case was, the ferryman of Gravesend took forty-seven passengers into his barge, to pass to London, and Mouse was one of them, and the barge being upon the water, a great tempest happened, and a strong wind, so that the barge and all the passengers were in danger to be drowned, if a hoghead of wine and other ponderous things were not cast out, for the safeguard of the lives of the men: it was resolved *per totam curiam*, that in case of necessity, for the saving of the lives of the passengers, it was lawful to the defendant, being a passenger, to cast the casket of the plaintiff out of the barge, with the other things in it; for *quod quis ob tutelam corporis sui fecerit, jure id fecisse videtur*, to which the defendant pleads all this special matter; and the plaintiff replies, *de injuria sua propria absque tali causa*: and the first day of this term, this issue was tried, and it was proved directly, that if the things had not been cast out of the barge, the passengers had been drowned; and that *levandi causa* they were ejected, some by one passenger, and some by another; and upon this the plaintiff was nonsuit.

It was also resolved, that although the ferryman surcharge the barge, yet for safety of the lives of passengers in such a time and accident of necessity, it is lawful for any passen-

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passenger to cast the things out of the barge: and the owners shall have their remedy upon the surcharge against the ferryman; for the fault was in him upon the surcharge; but if no surcharge was, but the danger accrued only by the act of God, as by tempest, no default being in the ferryman, every one ought to bear his loss for the safeguard and life of a man; for interest *reipublicæ quod homines conserventur*, 8 Ed. 4. 23, &c. 12 H. 8. 15. 28 H. 8. Dyer 36. plucking down of a house, in time of fire, &c. and this *pro bono publico; et conservatio vitæ hominis est bonum publicum*. So if a tempest arise in the sea, *levandi navis causa*, and for salvation of the lives of men, it may be lawful for passengers to cast over the merchandizes, &c.

Prohibitions del Roy,

Mich. 5 Jacobi 1.

NOTE, upon Sunday the 10th of November in this same term, the King, upon complaint made to him by Bancroft, Archbishop of Canterbury, concerning prohibitions, the King was informed, that when the question was made of what matters the ecclesiastical Judges have cognizance, either upon the exposition of the statutes concerning tithes, or any other thing ecclesiastical, or upon the statute 1 El. concerning the high commission, or in any other case in which there is not express authority in law, the King himself may decide it in his royal person; and that the Judges are but the delegates of the King, and that the King may take what causes he shall please to determine, from the determination of the Judges, and may determine them himself. And the Archbishop said, that this was clear in divinity, that such authority belongs to the King by the word of God in the scripture. To which it was answered by me, in the presence, and with the clear consent of all the Judges of England, and Barons of the Exchequer, that the King in his own * person cannot adjudge any case, either criminal, as treason, felony, &c. or betwixt party and party, concerning his inheritance, chattels, or goods, &c. but this ought to be determined and adjudged in some court of justice, according to the law

Judges to determine ecclesiastical matters.
Vide 13 Co. 4.
11, 11, &c.
2 Co. 44, 45.
5 Co. 9. 16, 20.
11 Co. 25.
See and note the Introduction to Gibson's Codex, p. 20, 21.
Carthew 215.

En Sycophonem.

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2 R. 3. 9. 21.
H. 7. 8.

17 H. 6. 14. 339.
Ed. 3. 14.

Stat. 4 H. 4.
cap. 23.

law and custom of England, and always judgments are given, *ideo consideratum est per curiam*, so that the court gives the judgment: and the King hath his court, viz. in the upper house of Parliament, in which he with his Lords is the supreme Judge over all other Judges; for if error be in the Common Pleas, that may be reversed in the King's Bench: and if the court of King's Bench err, that may be reversed in the upper house of Parliament, by the King, with the assent of the Lords spiritual and temporal, without the Commons: and in this respect the King is called the Chief Justice, 20 H. 7. 7. a. by Brudnell: and it appears in our books, that the King may sit in the Star-chamber; but this was to consult with the Justices, upon certain questions proposed to them, and not *in judicio*: so in the King's Bench he may sit, but the court gives the judgment: and it is commonly said in our books, that the King is always present in court in the judgment of law; and upon this he cannot be nonsuit: but the judgments are always given *per curiam*; and the Judges are sworn to execute justice according to law and the custom of England. And it appears by the act of Parliament of 2 Ed. 3. cap. 9. 2 Ed. 3. cap. 1. That neither by the great seal, nor by the little seal, justice shall be delayed; *ergo*, the King cannot take any cause out of any of his courts, and give judgment upon it himself, but in his own cause he may stay it, as it doth appear 11 H. 4. 8. And the Judges informed the King, that no King after the Conquest assumed to himself to give any judgment in any cause whatsoever, which concerned the administration of justice within this realm, but these were solely determined in the courts of justice: and the King cannot arrest any man, as the book is in 1 H. 7. 4. for the party cannot have remedy against the King; so if the King give any judgment, what remedy can the party have. *Vide* 39 Ed. 3. 14. one who had a judgment reversed before the council of state; it was held utterly void, for that it was not a place where judgment may be reversed. *Vide* 1 H. 7. 4. Hufsey Chief Justice, who was Attorney to Ed. 4. reports, that Sir John Markham, Chief Justice, said to King Edw. 4. that the King cannot arrest a man for suspicion of treason or felony, as others of his lieges may; for that if it be a wrong to the party grieved, he can have no remedy: and it was greatly marvelled that the Archbishop durst inform the King, that such absolute power and authority, as is aforesaid, belonged to the King by the word of God. *Vide* 4 H. 4. cap. 22. which being translated into Latin, the effect is, *judicia in curia Regis reddita non annihilantur, sed*

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sed stet iudicium in suo robore quousque per iudicium curiæ Regis tanquam erroneum, &c. Vide West. 2. cap. 5. Vide le stat. de Marlbridge, cap. 1. Provisum est, concordatum, et concessum, quod tam maiores quam minores iustitiam habeant et recipiant in curiâ domini Regis, et vide le stat. de Magna Charta, cap. 29.

25 Ed. 3. cap. 5. None may be taken by petition or suggestion made to our lord the King or his council, unless by judgment: and 43 Ed. 3. cap. 3. no man shall be put to answer without presentment before the Justices, matter of record, or by due process, or by writ original, according to the ancient law of the land: and if any thing be done against it, it shall be void in law and held for error. *Vide 28 Ed. 3. c. 3. 37 Ed. 3. cap. 18. Vide 17 R. 2. ex rotulis Parliamenti in Turri, art. 10.*

A controversy of land between parties was heard by the King, and sentence given, which was repealed, for this, that it did belong to the common law: then the King said, that he thought the law was founded upon reason, and that he and others had reason, as well as the Judges: to which it was answered by me, that true it was, that God had endowed his Majesty with excellent science, and great endowments of nature; but his Majesty was not learned in the laws of his realm of England, and causes which concern the life, or inheritance, or goods, or fortunes of his subjects, are not to be decided by natural reason, but by the artificial reason and judgment of law; which law is an act which requires long study and experience, before that a man can attain to the cognizance of it; and that the law was the golden met-wand and measure to try the causes of the subjects; and which protected his Majesty in safety and peace: with which the King was greatly offended, and said, that then he should be under the law, which was treason to affirm, as he said; to which I said, that Bracton saith, *quod Rex non debet esse sub homine, sed sub Deo et lege.*

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*Vide Fleta fo. 2.
Bracton 74.*

[Note, Bracton and Fleta both affirm, *Rex habet superiores in regno Deum et legem. Item curiam suam, i. e. Comites et Barones, &c.*]

R O B E R T S's Case,

Mich. 8 Jacobi Regis.

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Antea 63, &c.
Post. 76, 77.
Tithes substract-
ed.

See Gibson's
Cod. 719, 722.

Watson's Cler-
gyman 578, 589,
&c. 632, &c.

IN this term, in the case of one Roberts, a prohibition had been granted in a case of subtraction of tithes, upon surmise that the plaintiff being defendant in the Spiritual Court, had but one witness in that court to prove his demise; to which that court said, that *singularis testis* is not allowable; and upon consideration and sight of a prohibition granted upon the same cause in Hil. 3 El. in *Banco Regis*, it was resolved by Coke Chief Justice & *totam curiam in Communi Banco*, that consultation should be granted, and that for divers causes.

1. It appears by the Register, fol. 5. that it is put for a rule, *quod non est consonum rationi, quod cognitio accessorii in curia Christianitatis impediatur, ubi cognitio causæ principalis ad forum ecclesiasticum noscitur pertinere*: and with this agrees 1 R. 3. 4.

2. If such a surmise shall be allowed, then in every case for mere delay such a surmise may be made: for he who was plaintiff in the Spiritual Court cannot deny, that where it is surmised that he hath one witness, that he hath two or more, for then he affirms matter against himself: and when the Spiritual Court hath jurisdiction of the principal cause, they determine the accessory. But it was objected, that if A. claiming a lease by B. of a rectory, libels for subtraction of tithes, and the defendant pleads a former lease made by B. and C. and the defendant hath but one witness in the case to prove the former lease, if no prohibition shall be granted, the defendant shall be charged: and if C. sue him upon the statute of 2 Ed. 6. at the common law, the testimony of that one only will there be sufficient, and so he shall be twice charged: to which it was answered, that first the fault was the defendant's, that he would not set forth his tithes, and then he shall be charged whosoever takes them: but in such a case, those of the Ecclesiastical Court will upon one good witness,

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ness, and any concurrent vehement presumption, as possession, or the like, allow of such a proof: and the testimony of one witness in our law is no conclusive evidence, but ought to be left to the conscience of the jury, and so the validity or invalidity of proof of matters of *fact* shall be left to them; but if a question of the common law arise from the party upon the construction of a statute, or the like, and those of the Ecclesiastical Court will take upon them to judge of it against the rule of law, * there, upon special surmise of it, and upon the shewing of the answer or other pleadings of the parties, by which it appears to the court, that such surmise is on a good ground, a prohibition lies; for matter in law, arising upon estates or interests (given) by the common law and construction of statutes, ought to be determined according to the rules of common law; *et non debet trahi ad aliud examen*. Page [66]

And Coke Chief Justice cited a notable judgment, *Pasch. 35 El. in Bank le Roy*; Fuller brought a prohibition against Clemens and Wiskard; and Fuller counted that he himself was owner of the rectory of Longham in the county of Norfolk, and libelled against Clemens one of the defendants, before the Official of the Bishop of Norwich, for subtraction of tithes, *scil.* of wheat, &c. pendent which suit, the said Wiskard, intervening *pro interesse suo*, made these allegations against the said Fuller.

1. That the said rectory was impropriate to the monastery of Wendling, and by the dissolution of the said monastery, came to the hands of H. 8. and did convey it by mesne descent to Queen Elizabeth, who by her letters patent of concealment granted it to Min and Hall, who enfeoffed Bozome, who did let it to Wiskard for four years, and proved his allegations by witnesses, upon which in fine, sentence was given against Fuller, and 8l. 10s. given to Clemens for costs, and 13l. 6s. to Wiskard; and after Fuller did appeal to the Court of the Archbishops, and there Fuller claimed the said rectory by reason that Hall was seised of it, and by his deed gave and granted the said rectory, and all lands and tithes to it appertaining, to Sir Edward Clere, before the feoffment supposed to be made to Bozome: and that Sir Edward Clere by his deed did enfeoff Fuller; and although that he offered to prove the delivery of the deed of the said feoffment made to Sir Edward Clere by one sole witness, the Ecclesiastical Court would not allow it without producing another witness: and Fuller further said, that although he had further alleged there, that these were matters determinable at the com-

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mon law, notwithstanding they gave sentence : the defendants for to have a consultation pleaded, that Fuller in the said Court of the Arches proved the delivery of the deed afore-said, by Sir Edward Clere and Mause, but could not prove livery and seisin according to the deed : and for this cause sentence was given, without (for) that the Judges of the Arches would not admit the said proof, unless he proved the deed by other witnesses ; upon which Fuller demurred in law ; and it was objected by the counsel for Fuller.

1. That Wiskard, who is a mere stranger to the suit, and who comes in *pro interesse suo* in the said rectory, pleads matter merely determinable at the common law, *scil.* letters patent, feoffment, and lease for years ; and on the other part Fuller claims an estate in the said rectory, by conveyance at the common law. And now the question in the Ecclesiastical Court being only who hath the best estate in the said rectory by the common law, this ought to be tried by the common law, and not in the Ecclesiastical Court ; for this is the birth-right of the subject to have his inheritance and freehold tried and determined by common law ; for the civil law differs much in deciding of inheritances.

2. It was objected, that all matters in law ought to be determined by the Judges of the law ; and in this case, matters of law arising, *scil.* if a man hath a rectory impropriate, which consists in glebe and tithes, and by his deed gives and grants the said rectory, and all lands and tithes any way belonging or appertaining to it, to another and his heirs ; * and no livery is made in this case, if the tithes shall pass, or no, for that tithes may pass without any livery : this question is not fit to be determined by the ecclesiastical Judges, but by the Judges of the common law, *quod quisque novit, in hoc se exerceat.*

3 It was objected, that Wiskard was a mere stranger to the suit, and all his allegation is temporal, and for that it is a stronger case to maintain a prohibition, forasmuch as betwixt him and Fuller nothing is in question, but to whom the inheritance of the rectory belongs ; but Clements, who is sued for subtraction of tithes, hath greater colour in his defence, being lawfully sued in the Ecclesiastical Court, than for Wiskard, who is no party to the suit for any ecclesiastical cause, but all his allegation, as hath been said, is temporal.

4. It

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4. It was objected, that Fuller had but one witness to prove the delivery of the deed; and in the ecclesiastical law, *unus testis, est nullus testis*; for all which causes it was prayed that the prohibition may stand, and that no consultation may be granted.

To which it was answered and resolved by Sir Christopher Wray Chief Justice, and *per totam curiam*.

1. That to the first objection, for that the original belongs to the Ecclesiastical Court, the determination of all that which depends upon it belongs to the Judges of the same court, although that the matter be triable by the common law; but where the original matter belongs to the common law, and is there commenced, and issue be taken upon matter triable by the ecclesiastical law, there the Judges of our law shall write to the Judges of the Ecclesiastical Court to try it, and to certify: and the reason of this diversity is, that our Judges have authority to write and command them by the King's writ to certify them; but they cannot write to the Judges of our law to try any thing, and to certify them, for they have no such authority to command by writ, but to obey the writs of the the King: as in any action ancestral, if bastardy be pleaded in the demandant, and upon this issue is joined, this shall be tried by the Bishop, and his certificate shall bind: so in a *Quare impedit*, if issue be taken, whether a Clerk, which was presented, was able, or not able, this shall be tried by examination of the clerk, and certified by the Bishop: but although that such issues are in their nature triable by the ecclesiastical law, yet if the case was such, that the Ecclesiastical Court could not try it, then (to the end that justice shall not be wanting) such ecclesiastical matter shall be tried by the common law, as 4 Ed. 3. 26. if the presentee be dead, if he was able, or not able, shall be tried *per pais*; for the Bishop cannot try it: but against this was objected the statute *De Articulis cleri*, c. 13. by which it is provided, *quod de idoneitate personæ personatæ ad beneficium ecclesiasticum, pertineat examinatio ad judicem ecclesiasticum*; upon which it was concluded, that the trial *De idoneitate personæ*, in all cases belongs to court-christian. To which it was answered and resolved, that true it is, that the trial of ability belongs to them; but the statute explains in what manner it shall be made, for the statute saith, *pertinet examinatio ad judicem ecclesiasticum*, so that this trial ought to be by examination of the party, and this cannot be when the presentee is dead:

See Cod. 1073.

Vaugh, 304.

2 Inst. 614.

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and although he be not party to the writ, yet he may be examined; and with this agrees 39 Ed. 3. 2. The Earl of Arundel's case, and 4 Ed. 3. 25. 16 El. Dyer 327. So if bastardy be alleged in one who is not party to the writ, there, for this, that the certificate binds for ever, it should be against law and reason, that he should not be party to the certificate; for this cause in such case it shall be tried *per pais*; and if any difficulty ariseth upon it, the Judges of our law use to consult with the Judges ecclesiastical; and with this accords 4 Ed. 3. 37. The same law of profession, 42 Ed. 3. 8. So if bastardy be alleged in one who is dead. *Vide* 17 Ed. 3. 5. where bastardy is alleged in the tenant, and one who is a stranger to the writ, who are sisters. *Vide* 32 Ed. 3. Trial 59. where the tenant alleged bastardy in himself, and the demandant doth aver him *mulier*. *Vide* 29 Aff. pl. 14. 6 El. Dyer 226, 228. If the issue be *quod vacavit per resignationem*, part of which is temporal, and part spiritual, this shall be tried *per pais*. *Vide* 9 H. 7. Profession and the time of it, &c. But admission and institution, although that it be alleged in a stranger to the writ, yet this shall be tried by the ordinary; as it appears 7 Ed. 6. 78. 6. in Dyer; for admission, institution, resignation, *et similia*, are judicial acts, and remain in their courts and register, upon which they ground their certificate; otherwise it is of bastardy, idoneity, &c. By which it appears, that in divers cases the Judges of the common law write to the ecclesiastical Judges, commanding them to certify some thing put in issue; and the Judges of our law prohibit the Judges ecclesiastical to hold plea of some things which are determinable at common law; but the Court Ecclesiastical hath not power to write to our Judges, or to command them, or to prohibit them when they hold plea of things determinable by the ecclesiastical Judges; but this is erroneous, and shall be reversed by error. And of the other side, if in the Ecclesiastical Court the suit is for a legacy, and the defendant plead a release, if in the admitting or rejecting of proofs concerning this release, which is matter determinable at common law, they do wrong to the plaintiff or defendant, they have no remedy but by way of appeal.

2. To the second it was answered and resolved, that if upon consultation with men learned in the law, they give sentence according to law, this is well done; and no prohibition ought to be granted; but if they take upon them

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them to draw the interest of any man *ad aliud examen*; and to judge against the rule of law, concerning the inheritance or interest of any, there prohibition lies: and in the case at the bar, they well resolved the law, for by the said livery of the charter the tithes do not pass as gross, for this, that the intention of the parties was to pass the entire rectory by feoffment, and not to pass the tithes by the same, and so to dismember the rectory by fractions, and that by construction of law, against the intention of the parties.

3. As to the third, it was answered and resolved, that by the ecclesiastical law, a stranger may come in *pro interesse suo*; and when they have jurisdiction of the original cause of the suit, we ought not to draw in question their order and proceeding; but if they proceed *inverso ordine*, or not observing form, this ought to be redressed by appeal: and although that the matter depending upon the original cause be determinable by the common law, yet it shall be determined, as it hath been said, in the Ecclesiastical Court.

4. As to the fourth objection, it was answered and resolved, that such a surmise, that he hath but one witness, is not sufficient to have a prohibition, for this, that the Ecclesiastical Court hath jurisdiction of the principal, and if such a surmise shall be sufficient, all suits in the Ecclesiastical Court shall be either delayed, or quite taken away, for such a surmise may be made in every case; and the plaintiff in the Ecclesiastical Court cannot have any good answer to it to have a consultation, which agrees with the resolution in the principal case, &c.

* S M I T H's Case.

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J. L. Co. Litt. 6. 6.

IT was resolved, upon evidence, by Coke Chief Justice *de Banco, inter J. S.* who informed upon the stat. of usury, and one Smith, that the parties to the supposed usurious contract shall not be admitted witnesses, for this, that upon the matter they were *testes in propria causa*, and by their oath shall avoid their bond, &c. or shall be revenged on him who lent them the money, before they are enforced to repay it: and for the most part they incite and raise up one of their own servants to inform and have part of the thing recovered.

H 3

Lady

Ante 20.
Usury Evidence.
See 1 Hawk. c.
82. sect. 27.
2 Hawk. c. 46.
Sect. 24

In 21. Hen. 8th.
362. (G. f.) p. 1.
2. v. Abraham.
v. Bunn. 4.
Burr. 2251.

Lady THROGMORTON's Case.

Trin. 8 Jac. 1.

High Commissioners.

Habeas Corpus.
Antea 19, 27,
45, 47.
Post. 82, 83,
104, 219.

UPON a *Habeas corpus* by Elizabeth Lady Throgmorton, prisoner in the Fleet, the return was; the Lady Throgmorton was committed by George Bishop of London, and others, ecclesiastical Commissioners, under their hands, till further order should be taken for her enlargement: and the cause of the commitment of her was, for that she had done many evil offices betwixt Sir James Scudamore and her daughter the Lady Scudamore, wife of the said James, and to make separation betwixt them, and detained her from her husband: and upon her departure after sentence before the Commissioners, for divers contemptuous words against the court, saying, that she neither had law nor justice there: and it was resolved, that for detaining of the wife, and endeavouring to make separation, no suit can be before the High Commissioners, for that it is not any enormous offence within the meaning of the act.

2. For the detaining of the wife, there is remedy by the common law.

3. Without question, for such an offence they cannot imprison the wife.

4. By the words it doth not appear, that they were spoken in the court.

Secondly, it is no court of record, for that they proceed according to the civil law, and it is like the Admiralty Court; and for this they cannot imprison, for none shall be committed for misdemeanor in court, unless that the court be of record.

5. It doth not appear by the return what court this was, which is uncertain; and upon this, upon good consideration, she was bailed.

But

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But Randal and Hickins were this very term committed by the High Commissioners, for that they were vehemently suspected to be Brownists, &c. And they obtained a *Habeas corpus*, and were remanded for this, that the High Commissioners have power to commit for heresy. [Quære nunc stat. 29 Car. 2. and the statute for abolishing this court, &c.]

An addit.?
M. M.

* The Lord ABERGAVENY's Case. Page [70]

IN the Parliament a question was made by the Lord of Northampton, Lord Privy Seal, in the Upper House of Parliament: that one Edward Nevil, the father of Edward Nevil, Lord of Abergavenny, which now is, in the 2d and 3d of Queen Mary, was called by writ to Parliament, and died before the Parliament: if he was a Baron or no, and so ought to be named, was the question. And it was resolved by the Lord Chancellor, the two Chief Justices, Chief Baron, and divers other Justices there present, that the direction and delivery of the writ did not make him a Baron or Noble until he did come to the Parliament, and there sit, according to the commandment of the writ; for until that, the writ did not take its effect, and the words of the writ were well penned, which are, *Rex et Regina, &c. Edwardo Nevil de Abergavenny Chivalier, quia de advisamento et assensu concilii nostri pro quibusdam arduis et urgentibus negotiis statum et defensionem regni nostri Angliæ concernentibus, quoddam Parliamentum nostrum apud Westmonasterium, 21 die Octobris proximo futuro teneri ordinavimus, et ibidem vobiscum, ac cum Prælati, Magnatibus & Proceribus dicti regni nostri colloquium habere et tractatum: vobis in fide & ligeantia, quibus nobis tenemini, firmiter injungendo mandamus, quod consideratis dictorum negotiorum arduitate & periculis imminentibus, cessante excusatione quacunque, dictis die & loco personaliter interfuitis nobiscum, ac cum Prælati, Magnatibus ac Proceribus supradictis, super dictis negotiis tractaturi, vestrumque consilium impensur' & hoc sicut nobis, &c.* And in the 35 H. 6. 46. and other books, he is called a Peer of Parliament, the which he cannot be until he sit in Parliament, and he cannot be of the Parliament until the Parliament begin; and forasmuch as he hath been made a Peer of Parliament by writ, (by which implicitly he is a Baron) the writ hath not its operation and effect, until he

The writ doth not make a Peer, &c.
Vide Post. 81, 96, 108, 112.
1 Inst. 16.
2 Salk. 509, 510.

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he sit in Parliament, there to consult with the King and the other Nobles of the realm; which command of the King by his *Superfedeas* may be countermanded, or the said Edward Nevil might have excused himself to the King, or he might have waved it, and submitted himself to his fine; as one who is distrained to be a Knight, or one learned in the law is called to be a Serjeant, the writ cannot make him a Knight, or a Serjeant: and when one is called by writ to Parliament, the order is, that he be apparelled in his Parliament robes, and his writ is openly read in the Upper House, and he is brought into his place by two Lords of Parliament, and then he is adjudged in law *inter pares regni*, that is to say, *ut cum olim senatores e censu eligebantur, sic Barones apud nos habiti fuerint, qui per integram baroniam terras suas tenebant, sive 13 feoda militum, et tertiam partem unius feodi militis, quolibet feodo computato ad 20 l. quæ faciunt 400 marcas denarii erat valentia unius baroniæ integræ, et qui terras et redditus ad hanc valentiam habuerint, ad Parliamentum summoniri solebant*; so that by this it appears, that every one who hath an intire barony may have of right and of course a writ to be summoned to Parliament, for without writ none can sit in Parliament: and with this agrees our books, for *una voce* they agree, that none can sit in Parliament as Peer of the realm, without matter of record; and if issue be taken, whether a Baron or no Baron, Earl or no Earl, this shall not be tried *per pais*, but by the record, by which it appears, that he was a Peer of Parliament; for without matter of record he cannot be a Peer of Parliament, * 35 H. 6. 46. 48 Ed. 3. 30. b. 48 Aff. pl. 6. 22 Aff. pl. 24. Register 287. *Henricus tertius post magnas perturbationes & enormes exactiones inter ipsum Regem, Simonem de Monte forti, & alios Barones motas et susceptas, statuit et ordinavit, quod omnes illi Comites et Barones regni Angliæ, quibus ipse Rex dignatus est brevia summonitionis dirigere, venirent ad Parliamentum, et non alii nisi forte dominus Rex alia illa brevia eis dirigere voluisset*: which act or statute continues in force to this day, so that now none, although that he hath an entire barony, can have a writ of summons to Parliament without the King's warrant, under the privy seal at least.

But if the King creates any Baron by letters patent under the great seal to him and his heirs, or to him and to his heirs of his body, or for life, &c. there he is a Nobleman presently; for so he is expressly created by letters patent of the King, which cannot be counter-

Note.

Post. 96.

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*see my mss. notes
in Co. Litt. 16. b.*

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countermanded; and he ought to have a writ of summons to Parliament of right and of course, and he shall be tried by his Peers, if he shall be arraigned before any Parliament; but so shall not he be who is called by writ, until he sits in Parliament, which is the diversity.

Richard the second created John Beauchamp of Holt, Baron of Kidderminster, by letters patent, dated 10 Oct. 11th year of his reign, where all others before him were created by writ. *Vide* Cotton 319, he was summoned by writ. But it is said he never sat in Parliament. And note, he was Delapool's friend, and fell with him.

OLDFIELD and GERLING's Cases.

Trin. 8 Jacobi 1.

IN this very term Thomas Oldfield came out of the court out of the Duchy, and before he came into Westminster-hall, with a knife stabbed one Ferrar, a Justice of Peace, of which he died: and if Oldfield should have his right hand cut off, was the question before the two Chief Justices, Chief Baron, Walmesley, Warburton, Foster, and divers other Justices. And it was resolved, no; for it ought to be in the hall of Westminster, *sedentibus curiis*, as it appears in 3 Eliz. Dyer 188. 41 Ed. 3. title Coron. 280. And a precedent was shewn, *anno 9 Eliz. in Banco Regis*, where one Robert Gerling smote one in Whitehall, sitting in the Court of Requests, and was but fined and ransomed: the same law if one smite one in the court of the Duchy: but if one smite another before the Justices of assise, there his right hand shall be cut off, as it appears, 22 Ed. 3. fol. 13. and 19 Ed. 5. title Judgment. And one Bellingham, *anno 2 Jac.* in the hall of Westminster, *sedentibus curiis*, with his elbow and shoulder, out of malice, jostled Anthony Dyer, of the Inner Temple, so that he overthrew him, and with his feet spurned him upon the legs, but did not smite him neither with his hand, nor with any weapon: and yet it was held that his right hand should be cut off, &c. upon which Bellingham was indicted in *Banco Regis*, but after obtained his pardon.

Stabbing in Westminster hall. See 6 Mod. 75, 76. 1 Sid. 211. Cro. Car. 272. Ryley's Plac. Par. 6, 7. Pryn on 4 Inst. 18, 19. 2 Inst. 449.

Gerling's case.

Bellingham's case.

Bishop

Bishop and Deans Leases.

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A CASE was put to all the Justices of England, which was such; the bishopric of Waterford and Lismore, being originally two bishoprics distinct, were by lawful authority in the reign of H. 3. united and consolidated, but the Chapters yet remain several; after which union the Bishop aliened lands of the see of Waterford, and aliened lands of the see of Lismore, with the confirmation of the Chapter of Lismore; the question was, whether such alienations are not voidable by the successor, being without the confirmations of both the Deans and Chapters. The second question * was, whether the Queen might avoid such alienations, *contra formam collationis* by seisure, or otherwise: and the Justices demanded a view of the union; to which it was answered, that it was not extant; then it was resolved by the Justices, that inasmuch as the usage hath been after the said union, that the several Deans and Chapters have severally made confirmations, *ut supra*, it shall be intended that the union was made especially in such manner, *scil.* that notwithstanding the union, yet for avoiding of confusion, and in respect of the remoteness of the deaneries and chapters, that estates made shall be severally confirmed, as before the union, and then such confirmations shall be good, for in such case, *modus et conventio vincunt legem*: but if the union was made generally, and the Bishop eligible by both Chapters, then estates made ought to be confirmed by both the Chapters. *Vide* 50 Edward 3. title Assise, Statham, the time of R. 2. title Grant, 27 H. 8. Dyer 58. 11 El. Dyer 33 H. 8. cap.

See 2 Co. 41.
4 Co. 76, 108.
6 Co. 68.
8 Co. 170.
11 Co. 11.

It was resolved, that upon a lawful alienation made, with confirmation of the Dean and Chapter, no *contra formam collationis* lieth upon the statute of Westminster. 2. as hath been resolved in the Seventh Part of my Reports.

Of

OF CONVOCATIONS.

Trin. 8 Jac. 1.

NOTE, it was resolved by the two Chief Justices and divers other Justices; at a committee before the Lords in the same Parliament, on divers points concerning the authority of a convocation.

See Gibson's
Codex p. 28, 40,
54, 98, 413, 494,
528, 974, 984.
4 Inst. 322.
1 Hawk. c. 2.
Sect. 2, 3, 4.
2 Salk. 412.

1. That a convocation cannot assemble at their own or the Archbishop's convocation, without the assent of the King, *i. e.* by writ.

2. That after their assembly they cannot confer together to constitute any canons without licence *del Roy*.

3. When they upon conference conclude any canons, yet they cannot execute any of their canons without royal assent.

4. They cannot execute any after royal assent, but with these four limitations.

1. That they be not against the prerogative of the King.

2. Nor against the common law.

3. Nor against any statute law.

4. Nor against any custom of the realm.

And all this appears by the statute 25 Hen. 8. cap. 19. and this was but an affirmance of what was before the said statute, for that it appears by the 19 Ed. 3. title *Quare non admittit* 7. where it is held, that if a canon law be against the law of the land, the Bishop ought to obey the commandment of the K. according to the law of the land, 10 H. 7. 17. there is a canon that no spiritual person shall be put to answer before a secular Judge; but this does not bind, because it is against the common law: and it appears by the statute of Merton, cap. 9. that they in case of bastardy were enforced to certify against the law of the holy church, that *nati ante matrimonium fuerint bastardi, quia ecclesia habet tales pro legitimis, & rogaverunt omnes Episcopi Mag-nates quod consentirent, quod qui nati fuerint * ante ma-trimonium essent legitimi*; which proves, that the canon

See Bp. Wake's
State of the
Church, chap.
10, &c.

2 Inst. 97, 98.

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law

1 Inst. 188, 399,
400.
4 Inst. 322, 323.

law in this point being repugnant to the law of the land, was not of any force: and for this, they implored the aid of the Parliament, *et omnes Comites & Barones una voce responderunt, quod nolumus leges Angliæ mutari, quæ huc usque usitatæ sunt & approbatæ.*

2. H. 6. 13. A convocation may make constitutions; by which those of the spirituality shall be bound, for this, that they all, or by representation, or in person, are present, but not the temporality.

21 Ed. 4. 47. The convocation is spiritual, and all their constitutions are spiritual. *Vide* the records in the Tower of 18 H. 8. 8 Ed. 1. 25 Ed. 1. 11 Ed. 2. & 15 Ed. 2.

Prohibitio Regis ne clerus in congregatione sua, &c. attemptet contra jus seu coronam. Et alia, ne quod statuat in concilio suo in præjudicium Regis seu legis, &c. By which it appears, that they can do nothing against the law of the land; for every part of the law, be it common law, or statute law, cannot be abrogated nor altered without an act of Parliament, (to which every one shall be party) except for spiritual causes, or which concern spiritual persons; nor then, if it be against the prerogative of the King or the common law.



Trin. 8 Jac. 1.

Ld. Admiral.
See 4 Inst. 136.
Post. 79.

IN this very term the King referred the consideration of letters patent of the Lord Admiral of England, to the two Chief Justices, and the Chief Baron, whether by the said letters patent, the goods which pirates should take from others by robbery and piracy did pass to the Lord Admiral or no? And upon the consideration of the said letters patent, it appeared to us, that thereby he had *bona et chattalla piratorum*, and also *bona et chattalla deprædata, id est*, the goods robbed from others; which did not pass for two causes.—

Bona piratarum,
&c.
Molloy, lib. 1.
chap. 3, 4.

1. If the King grant *bona & chattalla felonum*, the patentee shall have the goods and chattels of the felon himself, in which he hath property, but he shall not

not have the goods and chattels which the felon stealeth from others.

2. The goods taken from others the King cannot grant, for it appears by the statute 27 Ed. 3. cap. 8. §. 2. that the merchant, &c. so robbed shall be received to prove, that the goods and chattels belong to him by his chart or cocket, or by other lawful proof of merchants, &c. the said goods shall be delivered without any suit at the common law, which act is general, be the robber privy or a stranger: but it was resolved, that until such proof be made, the King may seise the said goods; for goods of which the property is unknown, the King may seise: and if they are *bona peritura*, the King may sell them; and upon proof, &c. restore the value. And note, the statute doth not limit the owner in case of depredation to any certain time to prove the property of the same goods, as ought to be in case of wreck. *Vide stat.* 31 H. 6. cap. 4. *Vide* 2 R. 2. cap. 2. 13 Ed. 4. 9, 10. a good resolution of the Justices. And the Register * 129. F. N. B. Page [74] 114. when a subject of the King, who is spoiled beyond the seas, shall have a writ, &c. for to take goods within England, &c.

S I M O N Y.

Trin. 8 Jac. 1.

IT was agreed *ad mensam*, by all the Justices and Barons in Fleet-street, that if the patron, for any money, present any person to any benefice with cure, &c. that then every such presentation, and the admission, institution, and induction thereupon, are void, although the presentee be not party nor privy to it; for the statute intends to punish the wicked avarice of corrupt exactions by the loss of his presentation *hac vice*, and the statute gives the presentation to the Queen; and all this *per verba statuti*, which is penned strongly enough against corrupt patrons.

See Watson's
Clergyman's
Law, chap. 5.
& pa. 48, 96,
97, 146, &c.
Post. 101.

PRO-

PROCLAMATIONS.

Mich. 8 Jac. 1.

Proclamation
cannot make
that an offence
which was not.
See Gibson's
Codex * 989,
* 991.
Antea 19.

MEMORANDUM, that upon Thursday, 20 *Sept. Regis Jacobi*, I was sent for to attend the Lord Chancellor, Lord Treasurer, Lord Privy Seal, and the Chancellor of the Duchy; there being present the Attorney, the Solicitor, and Recorder: and two questions were moved to me by the Lord Treasurer; the one, if the King by his proclamation may prohibit new buildings in and about London, &c. the other, if the King may prohibit the making of starch of wheat; and the Lord Treasurer said, that these were preferred to the King as grievances, and against the law and justice: and the King hath answered, that he will confer with his Privy Council, and his Judges, and then he will do right to them. To which I answered, that these questions were of great importance. 2. That they concerned the answer of the King to the body, viz. to the Commons of the house of Parliament.

3. That I did not hear of these questions until this morning at nine of the clock; for the grievances were preferred, and the answer made when I was in my circuit. And lastly, both the proclamations, which now were shewed, were promulgated, *anno 5 Jac.* after my time of attorneyship: and for these reasons I did humbly desire them that I might have conference with my brethren the Judges about the answer of the King, and then to make an advised answer according to law and reason. To which the Lord Chancellor said, that every precedent had first a commencement, and that he would advise the Judges to maintain the power and prerogative of the King; and in cases in which there is no authority and precedent, to leave it to the King to order in it, according to his wisdom, and for the good of his subjects, or otherwise the King would be no more than the Duke of Venice: and that the King was so much restrained in his prerogative, that it was to be feared the bonds would be broken: and the Lord Privy Seal said, that the physician was not always bound to a precedent, but to apply his medicine according to the quality of the disease:

disease: and all concluded that it should be necessary at that time to confirm the King's prerogative with our opinions, although that there were not any former precedent or authority in law; for every precedent ought to have a commencement.

* To which I answered, that true it is that every precedent hath a commencement; but when authority and precedent is wanting, there is need of great consideration, before that any thing of novelty shall be established, and to provide that this be not against the law of the land: for I said, that the King cannot change any part of the common law, nor create any offence by his proclamation, which was not an offence before, without Parliament. But at this time I only desired to have a time of consideration and conference with my brothers, for *deliberandum est diu, quod statuendum est semel*; to which the Solicitor said, that divers sentences were given in the Star-chamber upon the proclamation against building; and that I myself had given sentence in divers cases for the said proclamation: to which I answered, that precedents were to be seen, and consideration to be had of this upon conference with my brethren, for that *melius est recurrere, quam male currere*; and that indictments conclude, *contra leges et statuta*, but I never heard an indictment to conclude, *contra regiam proclamationem*. At last my motion was allowed, and the Lords appointed the two Chief Justices, Chief Baron, and Baron Altham to have consideration of it.

Note, the King by his proclamation, or other ways, cannot change any part of the common law, or statute law, or the customs of the realm, 11 H. 4. 37. Fortescue *De laudibus Angliæ legum*, cap. 9. 18 Ed. 4. 35, 36, &c. 31 H. 8. cap. 8. *hic infra*: also the King cannot create any offence by his prohibition or proclamation, which was not an offence before, for that was to change the law, and to make an offence which was not; for *ubi non est lex, ibi non est transgressio*: ergo, that which cannot be punished without proclamation, cannot be punished with it. *Vide le stat.* 31 Hen. 8. cap. 8. which act gives more power to the King than he had before, and yet there it is declared, that proclamations shall not alter the law, statutes, or customs of the realm, or impeach any in his inheritance, goods, body, life, &c. But if a man should be indicted for a contempt against a proclamation he shall be fined and imprisoned, and so impeached in his body and goods. *Vide Fortescue*, cap. 9, 18, 34, 36, 37, &c.

But a thing which is punishable by the law, by fine, and imprisonment, if the King prohibit it by his proclamation,

tion, before that he will punish it, and so warn his subjects of the peril of it, there if he permit it after, this as a circumstance aggravates the offence; but he by proclamation cannot make a thing unlawful, which was permitted by the law before: and this was well proved by the ancient and continual forms of indictments, for all indictments conclude, *contra legem et consuetudinem Angliæ*, or *contra leges & statuta*, &c. But never was seen any indictment to conclude *contra regiam proclamationem*.

So in all cases the King out of his providence, and to prevent dangers, which it will be too late to prevent afterwards, he may prohibit them before, which will aggravate the offence if it be afterwards committed: and as it is a grand prerogative of the King to make proclamation (for no subject can make it without authority from the King, or lawful custom) upon pain of fine and imprisonment, as it is held in the 22 H. 8. Procl. B. But we do find divers precedents of proclamations which are utterly against law and reason, and for that void; for *quæ contra rationem juris introducta sunt, non debent trahi in consequentiam*.

An act was made, by which foreigners were licensed to merchandize within London; H. 4. by proclamation prohibited the execution of it; and that it should be in suspense *usque ad proximum Parliament*, which was against law. *Vide dorf. claus.* 8 H. 4. Proclamation in London. But 9 H. 4. an act of Parliament was made, that all the Irish people should depart the realm, and go into Ireland before the feast of the Nativity of the blessed Lady, upon pain of death, which was absolutely *in terrorem*, and was utterly against the law.

Hollinshed 722. *anno Domini* 1546. 37 H. 8. the whore-houses, called the stews, were suppressed by proclamation and sound of trumpet, &c.

In the same term it was resolved by the two Chief Justices, Chief Baron, and Baron Altham, upon conference betwixt the Lords of the Privy Council and them, that the King by his proclamation cannot create any offence which was not an offence before, for then he may alter the law of the land by his proclamation in a high point; for if he may create an offence where none is, upon that ensues fine and imprisonment: also the law of England is divided into three parts, common law, statute law, and custom; but the King's proclamation is none of them: also *malum aut est malum in se, aut prohibitum*, that which is against common law is *malum in se*, *malum prohibitum* is such an offence as is prohibited by act of Parliament, and not by proclamation.

Also

Also it was resolved, that the King hath no prerogative, but that which the law of the land allows him.

But the King for prevention of offences may by proclamation admonish his subjects that they keep the laws, and do not offend them; upon punishment to be inflicted by the law, &c.

Lastly, if the offence be not punishable in the Star-chamber, the prohibition of it by proclamation cannot make it punishable there: and after this resolution, no proclamation imposing fine and imprisonment, was afterwards made, &c. *Quæ* Note, *re antea* 20.

PROHIBITION.

Mich. 8 Jac. I.

NOTE, it was resolved in the same term, that if a man be excommunicated by the Ordinary, where he ought not to be, as after a general pardon, &c. and the defendant being negligent doth not sue a prohibition, but remains excommunicate by forty days, and upon certificate in Chancery, he is taken by the King's writ *De excommunicato capiendo*; that no prohibition lies in this case, for that he is taken by the King's writ, and no precedent or authority can be found where a prohibition was granted after the party was taken by the King's writ; for prohibition lies to prohibit ecclesiastical proceedings, not any thing which is done by the King's writ by force of the common law; and if a prohibition be granted, it will not deliver the party: then it was moved, what remedy hath the party who is so wrongly excommunicated? To which it was answered, that he hath three remedies, &c.

1. He may have a writ out of Chancery to absolve him; for as it is held in 14 H. 4. fol. 14. In all cases where a man is excommunicated by the Bishop against our law he shall have writ out of the Chancery directed to the Bishop, commanding him to assail him: and with this agrees 7 Ed.

4. 14.

2. When a man is excommunicated against the law of this realm, so that he cannot have a writ *De cautione*
Vol. VII. I admit-

No prohibition after the writ *De Excommunicato capiendo*. Comb. 166. 2 Roll. 318. Hob. 79. That prohibitions may go after sentence. See Farr. 148, 337. 1 Sid. 65, 332. 1 Show. 158, 172. 6 Mod. 252. Comb. 253, 254, 448, 462.

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admittenda, for then he ought * *parere mandatis ecclesiæ in formâ juris, id est, ecclesiastici*, where in truth it is, *excommunicatio contra jus et formam juris, id est, communis juris*: but if he shew his cause to the Bishop, and request him to assoil him, for this, that he was excommunicated after the offence was pardoned, or this, that the cause doth not appear to be of ecclesiastical cognizance, and he refuse to assoil him, so that he is now disabled to sue any writ of the King, so long as he remains excommunicated, he may have an action *sur le case* against the Ordinary, who hath done him this wrong, to disable him in this case; and with this agrees the Dr. & Stud. lib. 2. cap. 32. fol. 119.

3. If the party be excommunicated for none of the causes mentioned in the act of 5 Eliz. cap. 23. then he may have this for plea in the King's Bench by the same act, and avoid the penalties inflicted by the same act.

ee 13 Co. 4,
5, &c. ib.

Note, it was resolved by the court, &c. that where one is cited before the Dean of the Arches in cause of defamation, for calling the plaintiff whore, out of the proper diocese, *scil.* the diocese of London, against the statute of 23 H. 8. and the plaintiff hath sentence, and the defendant is excommunicated, and so continues 80 days: and upon certificate into the Chancery, a writ of *Excommunicato capiendo* is granted, and after the defendant is taken and imprisoned by force of it, that he shall not have a prohibition upon the statute 23 H. 8. for no writ in the Register extends to it, *et sententia, si quam fulminaveritis, sine dilatione revocetis*, and after sentence is appealed, a prohibition lies, as appears by the Register; but no writ nor precedent can be shewn in this case; but there is a writ in the Register called a writ *De cautione admittenda*, when the defendant is taken by the King's writ *De excommunicato capiendo, de parendo mandatis ecclesiæ*, and to assoil and deliver the defendant: but note a diversity, where it appears to the court, that the matter of the libel is not within their jurisdictions, as of lay fee, or of lay contract, &c. there lies a prohibition with clause to deliver the party, for there he cannot find caution *De parendo mandatis ecclesiæ*, for this, that *mandata ecclesiæ* are *contra legem & extra jurisdictionem suam*: but in the case at the bar, although it appears by the libel, that the defendant was of one such parish in London, yet inasmuch as the statute 23 H. 8. hath many exceptions, *scil.* that the Ordinary request the Archbishop, &c. to examine the case, &c. so that the said defamation being the matter of the libel, is of ecclesiastical cognizance, and the statute hath many exceptions, so that

See 13 Co. 6, 7.

that it doth not appear to us judicially without information, that the citation is against the form of the statute; and this information comes too late in this case after the defendant hath persisted so long in his contumacy, and is taken by the King's writ and imprisoned.

ADMIRALTY.

IT was resolved *per totam curiam*, that if one be sued in the Admiralty Court for a thing alleged to be done upon the high sea, within the jurisdiction of the Admiral, and the defendant plead to it, and confess the thing to be done, and after sentence is given, the court will be advised to grant a prohibition, upon surmise that it was done *infra corpus comitatus*, against their own confession, unless it can be made to appear to the court * by any matter in writing, or other good matter, that this was done upon the land, for otherwise every one will stay until after sentence, and then for vexation only sue out a prohibition; for although the admittance of the party cannot give a jurisdiction to the court where it of right hath none, for that it will be an incroachment upon the common law; yet when the court shall be advised that it is merely for vexation, and shall be intended for delay, if the prohibition shall not be sued forth, till after sentence; unless that he can shew good matter to the court to ascertain the court that this is not for vexation, it shall not be granted. And admonition was given to them which sue forth prohibitions, that they should not keep them by long time in their hands, and notwithstanding proceed in the Ecclesiastical Court, &c. And when they perceive that they cannot prevail, then to cast in their prohibitions; for if they abuse that liberty to the damage and vexation of the party, we will take such order as in case of a writ of privilege, if the defendant keep it until the jurors are ready, &c. it shall not be allowed.

The court cannot grant prohibition after sentence.
Vide ant. page 58, 59, 76. contra.

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Vide antea 76.

Dr. TREVOR's Case.

Hil. 8 Jac. 1.

Bishops, Chancellor, and Register.

Corruption in
officers, &c.
Vide Baldum de
falsitate vers. fi-
nem, et Becki-
um de jure sis-
tendi, cap. 24.
See 13 Co. 24,
&c. ib.

IN this very term in the case of Dr. Trevor, who was Chancellor of a Bishop in Wales, it was resolved, that the office of a Chancellor or Register, &c. in the Ecclesiastical Courts, are within the statute 5 Ed. 6. cap. 16. the words of which statute are, "any office, &c. which shall in any ways touch or concern the administration or execution of justice;" and the words are strongly penned against corruption of officers, for they are, "which shall in any wise touch or concern the administration," &c. And the preamble, "and for avoiding of corruption which may hereafter happen to be in the officers and ministers of those courts, places, and rooms, wherein there is requisite to be had the true administration of justice in services of trust: and to the intent, that persons worthy and meet to be advanced to the place where justice is to be ministered, in any service of trust to be executed, should be preferred to the same, and none other." Which act being made for avoiding of corruption in officers, &c. and for the advancement of persons more worthy and sufficient for to execute the said offices, by which justice and right shall be also advanced, shall be expounded most beneficially to suppress corruption. And inasmuch as the law allows ecclesiastical courts to proceed in case of blasphemy, heresy, schism, incontinence, &c. and the loyalty of matrimonies, of divorce, of the right of tithes, probate of wills, granting of administrations, &c. And that from these proceedings depend not only the salvation of souls, but also the legitimation of issues, &c. and that no debt or duty can be recovered by executors or administrators, without the probate of testaments or letters of administration, and other things of great consequence; it is most reason that such officers, which concern the administration and execution of justice in these points, which concern the salvation of souls, and the other matters aforesaid, shall be within this statute, than officers which concern the administration or execution of justice in

in temporal matters; for this, that corruption of officers in the said spiritual and ecclesiastical causes is more dangerous than the officers in temporal causes; for the temporal judge commits the party convict to the Gaoler, * but the spiritual judge commits the person excommunicate to the devil. Also those officers do not only touch and concern the administration of justice, &c. but also are services of great trust, for this, that the principal end of their proceedings is *pro salute animarum*, &c. and there is no exception or proviso in the statute for them.—*Ergo*,

It was resolved that such offices were within the purview of the said statute.

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The Diver,
Warden, or
Gaoler of the
Spiritual Courts.

ADMIRALTY.

Hil. 8 Jacobi Regis.

IT is to be understood, that the jurisdiction of the Admiralty is more ancient than Mr. Lambert in his jurisdiction of courts doth affirm, for there is held an opinion in these words concerning the Admiralty; I think that the decision of marine causes was not put out of the K.'s house, and committed over to the charge of the Admiral, until the time of Ed. 3. whereunto I am led, partly by the consideration of the time of his reign, which was much occupied in affairs beyond the seas, and by reason of his wars with France, and of the intercourse and trade of merchandize, which then flourished; and partly, for that I find no mention of the Admiralty before the reign of R. 2. who going about by a statute made the thirteenth year of his reign, to restrain the authority of that court which had exceeded her known limits, doth take order, that it should meddle no more than it was wont to do in the time of his grandfather Edw. 3. thereby reducing its authority, as I think, to the first original (*hoc ille*;) but without question the jurisdiction of the Admiralty is more ancient than the reign of the said King Edward 3. For where it is said, that there is found no mention of it before the time of Edward 3. I find a notable book in the time of Edw. 1. title Avowry 192. which proves the jurisdiction of the Admiralty more ancient than Mr. Lambert supposeth: the case was; one brought a replevin of his ship taken on the coast of Scarborough, upon the sea, and

Antea 73.
See 4 Inst. 134,
&c. to 147.
Post. 84.
See Spelm.
Gloss verbo Admiral.

4 Inst. 140.

carried into the county of Norfolk, and there detained: the plaint of taking in the coast of Scarborough, which is no town nor place certain by which the *Pais* may be taken, for the coast contains four leagues. And also of a thing done at sea, this court cannot have cognizances, for this judgment is given to mariners. Beresford who gave the rule in the case: the King wills that the peace be kept as well upon the sea as upon the land: and we find that you come by due process, and we see nothing why you ought not to answer, upon which book I observe five things.

1. That of things done upon the sea, certain judgment is given to mariners, *id est*, to Admirals, as shall appear, and that doth not belong to the court of the King, for this, that no *Pais* may be taken there: and for this, that of a thing in any town or place where the *pais* or jury may come, there the Admiral hath not jurisdiction.

2. This proves directly, that then the Admiral hath jurisdiction to adjudge things done upon the sea, from whence no *pais* may come; and this did not begin then: but without question, so long as there hath been trade and traffic (which is the life of every island) there was marine jurisdiction to redress depredations, piracies, murders, and other offences upon the sea; and to determine all contracts made there: and this doth appear by the said Beresford Chief Justice (who speaks in the voice of all the court) where he says, that the King willeth that the peace be as well kept upon the sea as upon the land; and it is not possible that peace should be kept without jurisdiction of justice.

3. The third thing to be observed is, that if part of the matter be done upon the sea, and part in a county, that the common law shall have all the jurisdiction.

4. The sea within the jurisdiction of the Admiral is described to be out of every county, for if the sea be within any county, then *pais* may come from thence, and the Admiral hath jurisdiction where the common law cannot give remedy.

5. If a thing be done upon the sea, *hors del county*, the party may plead it to the jurisdiction of the court: and all these points are directly, without any strain, collected out of the said book.

And it is to wit, that in ancient time the jurisdiction of the Admiral was called *maritima Angliæ*, and sometimes *marina Angliæ*, and so the *vocabulum artis* was made of an adjective, as the office of Chamberlainship of England

was

was granted to the Earl of Oxford of ancient time, *per nomen Camerariæ Angliæ*, so that *maritima Angliæ*, and since *marina Angliæ*, signifies the Admirallship, or Marinesthip of England: for *marinus*, *id est quod θαλάσσιος*, that is, of the sea, and *θαλασσιάρχος*, is the Admiral or General of the fleet; and *almarah*, by corruption Admiral, signifies the Governor or Captain of the navy; and so *Archigubernus* signifies the Admiral or chief Governor of the Captains of the navy, chief Captain of mariners, Admiral of the fleet, Admiral of the ships, &c. *sunt synonyma*: and in ancient time, sometimes one was Admiral of all England, and sometimes the office was divided: and for this *ex rotulo patentium de anno 6 H. 3. de maritima custodienda*, the letters patent are, *dominus Rex commisit Galfrido de Lacy marinam Angliæ custodiendam quamdiu dominus Rex placuerit*, with commandment of that attendance, *ad fidem, commodum, et honorem domini Regis. Teste, &c. apud Lond. 29 Augusti.* Vide Spelman ut ante.

Ex rotulo patentium anno 9 H. 3. Rex omnibus de costera maris Norf. & Suff. salutem. Sciatis quod concessimus Ricardo Agnillum marinam guardiam Norf. & Suff. cum omnibus pertinentiis, scil. Erewel, Oreford, Dunmervie, Gerem. et Lenn custodiendam quamdiu nobis placuerit, et ideo vobis mandamus, quod ei in omnibus, quæ ad dictam marinam pertinent, intendentes sitis & respondentes. Teste, &c. apud West. 3 Octob. And Geoffrey Lacy was called Admiral of England.

Charta 15 H. 3. 28. Junii, Petrus de Rivall habet ad totam vitam suam custodiam omnium portuum et totius costeræ marinæ Angliæ cum omnibus libertatibus et liberis consuetudinibus prædicti portuum et costeræ maris pertinentibus, &c. 2 pars Patent. 25 Ed. in 14 claus. in dorso in 18 William Leybourne Capitaneus marinariorum.

At this time there were two Admirals; the one had the government of all the fleet from the mouth of Thames *versus Boream*, the other from the mouth of Thames *versus occidentem*. 1 *Pars Patent. 25 Ed. 1. 25. Martii in 9. Johannes Botetort custos Regis portuum maritimarum versus partes boreales. 1. Pars Patentium, 10 Ed. 2. 8 Dec. Nicolaus Kirril constituitur Admirallus del Fleete, scil. omnium navium ab ore aquæ Thamisis versus partes occidentales, 18 Aug. Et ibid. Tho. de Drayton Admirallus ab ore aquæ Thamisis versus partes Boreales.*

And so in the time of R. 2. H. 4. H. 5. H. 6. during whose reigns there was likewise *unus, qui fuit Admirallus Angliæ.*

* 8 Ed. 2 Coron. 399. Where a man may see that which was done of one part, and the other of the water, &c. in Page [81]

that place the county may have cognizance, and it may be tried by a jury; which proves also, that that which may be tried by the common law, doth not belong to the Admiral's jurisdiction: and Stamford's Pleas of the Crown, lib. 1. fol. 51. citing this book, says thus, viz. So this proves that by the common law before the statute, &c. the Admiral shall not have jurisdiction, unless upon the high sea, which proves that the Admiral by the common law hath jurisdiction upon the high sea, *ex quo sequitur*, that his jurisdiction was by the common law, and then it is so ancient, that the commencement cannot be known; so that I do conclude, that his authority did not begin in the reign of Ed. 3. as Monsieur Lambert, upon uncertain conjectures supposeth: for if the jurisdiction hath then began and been instituted, it would have appeared upon record.

Honours and Dignities.

Pasch. 9 Jacobi 1.

Creations of Barons, &c.

2 Salk. 509,

510.

2 Inst. 668.

IT was resolved by the two Chief Justices, the Chief Baron, the Attorney, and Solicitor, that the King may erect any name of dignity, which was not before, and for that reason the King may create a dignity, by name of Baronet, and create one to be a Baronet, to him and his heirs males of his body issuing.

It was resolved, that if he does not create him of some place, he shall not have an estate tail, but fee-simple conditional, which shall be forfeited for felony; but if he create him Baronet of a place, then he shall have an estate-tail, within the statute of West 1. *De donis cond.*, and the King may grant to him, and the heirs males of his body, precedency before Knights Baronets, Knights of the Bath, and Knights Bachelors, and also may grant precedency to their wives, sons, and daughters, &c. And that he cannot create any dignity above the dignity of a Baronet, and under the dignity of a Baron: and that the creation of his dignity of a Baronet shall not discharge the heir to be in guard, as if the heir be made a Knight, for

See 10 Co. 37.b.

&c. *ibid.*

Parliament

Cases 9.

Note,

Part XII. No Accessary in Treason, &c.

for he is not made Knight by this, for the dignity of a Knight is not descendible.

No Accessary in Treason, Petit Larceny, and Trespafs.

Pasch. 9 Jac. 1.

NOTE, that in trespafs and treason, the highest and the lowest offences, there are not any accessaries, but all are principals: but in case of felony, above the sum of 12d. there, and in case of death, &c. there may be accessories, as well before as after; in case of petit larceny there cannot be any accessory for the smallness of the felony; then the case is, "that A. counterfeits the great seal of England, and B. knowing that he did counterfeit it, receives him, and abets and comforts him:" if B. in this case was guilty of the treason, is the question. And it seems he is not, for although that A. by the counterfeiting be a traitor, the accepting and comforting of him cannot make him an accessory, for that in case of high treason there can be no accessory, and a principal he cannot be, for this, * that at the time of the counterfeiting he did not know of it; but if one, before the act done, procure one to counterfeit the great seal, there, it is high treason; for in the law he himself counterfeits the great seal: and in the indictment he may be charged with the fact, viz. the counterfeiting; but so is not he who receives after the fact, for he cannot be charged with the fact: and in case of trespafs, he who gives consent and aid to the trespafs, is a principal in the trespafs; and this, as to me it appears, is very apparent in reason, and agrees with our books, as 19 H. 6. 47. b. he who is consenting and aiding to the making of false money, commits high treason, for he is *particeps criminis* before the fact done; but it is held in Conyer's case, Mich. 13 & 14 El. Dyer 296. that in the same case, if one after the act done know of the making of false money, and receive the party, this is not treason, but misprision of treason, for not making discovery, and with this accords 3 H. 7. 10. that it is not treason, which diversity Stamford's Pleas of the Crown, fol. 3. hath

Accessaries

1 Inst. 57. a.

1 H. H. P. C.

234.

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See Rep. Q. A.

25, 26.

2 Salk. 418,

334, 542.

Sir WILLIAM CHANCEY's Case. Part XII.

hath not well observed. *Vide* Dyer 298. *Vide le stat.* 27 *El.* which made him who received a Jesuit a felon, for by the judgment of the Parliament the receipt of a Jesuit, although he be a traitor, is not treason; for the statute makes the returning of a Jesuit treason, of which he who receives him cannot be indicted; but it is misprision for any who receives him, and doth not discover, according to the resolution of Conyer's case.

Sir WILLIAM CHANCEY's Case.

Pasch. 9 *Jac.* 1.

High commis-
sion.
Hab. Corpus.
Ant. 47, 69.
See 4 Inst. 334.
Wm. Thickne's
case.
Post. 84, 86,
104, 129.

Return.

Adultery.

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IN this very term Sir Wm Chancey having the privilege of this court, and being prisoner in the Fleet, was brought to the bar by *Habeas corpus* by the Guardian *de Fleete*, who returned, that the said Sir William was committed to the Fleet by force of a warrant from the High Commissioners in ecclesiastical causes: the tenor of which warrant follows in these words:

“ THESE are to will and require you in his Majesty's
“ name, by virtue of his high commission for causes
“ ecclesiastical, under the great seal of England, to us and
“ others directed, by force of a statute in such case provided,
“ that herewithal you take and receive into your custody the
“ body of Sir William Chancey, Knt. whom we will that
“ you keep and detain under custody, until further order
“ shall be taken for his enlargement, letting you know, that
“ the cause of his commitment is, for that being at the suit
“ of his Lady convented before his highness' Commissioners
“ Ecclesiastical, for adultery, and for expelling her from his
“ company, and cohabitation with another woman, without
“ allowing her any competent maintenance, and by his own
“ confession convicted thereof, he was thereupon by order of
“ court enjoined to allow his wife a competent maintenance,
“ according to his ability, and to perform such submission
“ and other order for his adultery, as by law should be en-
“ joined him. Which expressly he refused * to do, in con-
“ tempt of his Majesty's said authority, to us in that behalf
“ committed.” Given at London 19 *Martii* 1611, sub-

scribed,
London.

Henry Montague, } { Thomas Morton,
George Overall, } { Zachary Pasfield.

And.

Part XII. Sir WILLIAM CHANCEY'S Case.

And it was moved by Nicholas Serjeant of counsel with Sir William, that this return was insufficient, for two causes. The one for this, that adultery ought to be punished by the Ordinary, and is not such enormous offence that it shall be punished by the High Commissioners, upon which the offender cannot have his appeal, or other remedy; and clearly the wife shall not sue there for alimony; *quod fuit concessum per Coke, Warburton, and Foster*, but Walmsley doubted of adultery: for it seemed to him, that this was an offence enormous. 2. That by force of the act 1 El. the High Commissioners cannot imprison the said Sir William for adultery, nor for denying alimony to his wife (if that was within their jurisdiction.) And although that the words of the letters patent give them power to imprison the party, yet if the act doth not warrant it, they cannot imprison him. And Doderidge, Serjeant to the King, of counsel on the other side, did not defend the imprisonment to be lawful; and it was clearly agreed by Coke, Walmsley, Warburton, and Foster, that the Commissioners had not power to imprison him in this case: and Walmsley said, that although they have used by 20 years to imprison in such case, without exception taken, yet when it came before them judicially, they ought to judge according to law: and upon this Sir William Chancey was bailed: also it was resolved *per totam curiam*, that when upon the return it doth appear, that the imprisonment is not lawful, the court may discharge him of imprisonment; but in this case, the court thought fit rather to bail him, until the next term, and in the mean time to attend upon the Archbishop, and to do that which of right and reason they ought to do. Also it was resolved that the return was insufficient in form, viz.

1. It is not shewed when the adultery was committed.
2. He was enjoined to allow his wife a competent maintenance, without any certainty; and to perform such submission and other order for his adultery, as by the law he shall be enjoined, and it is all *in futuro*, and uncertain what order they will take, and yet for the refusal they imprison him: also they make their warrant by force of a commission to them and others directed, and do not say, or to any four of them, so that it may appear to the court that they who made the warrant had power by the commission; also it is said in the warrant, that he was summoned by the order of the court. *Vide* in my Treatise at large the reasons and causes for which the Commissioners (unless that it be in special cases) may not sue and imprison. *Vide* 4 Inst. 332, Pasch. 333, &c.

Adultery.
3 Inst. 332,
333, 334.
See Farll. 81,
82.

4 Inst. 332,
Pasch. 333, &c.

Pasch. 42 El. Rot. 1209. Ed. Thicknesse was imprisoned by the High Commissioners, and upon *Habeas Corpus* delivered by the Justices of the Common Pleas.

* EMPRINGHAM's Case.

Pasch. 9 Jac. 1.

Star-chamber.
Admiralty.
See 73, 79, 80.

IN this very term a case was moved in the Star-chamber, upon a bill exhibited by the Attorney-general against Rob. Empringham, Vice-Admiral in the county of York, Marmaduke Kettlewell, one of the Marshals of the Admiralty, and Thomas Harrison, one of the informers of the Court of Admiralty in the said county, and they were charged with oppression and extortion, that they had fined and imprisoned divers of the King's subjects in the county of York, which no Judge of the Admiralty can justify; for that the court is not a court of record, but the proceedings there are according to the civil law, and upon their sentence, appeal and no writ of error lieth: also the said Empringham hath caused divers to be cited to appear before him for things done in the body of the county; as for not repairing of the banks of a river, which is within the body of a county: also for cutting of trees upon his own soil, and such like, which were determinable by the common law; and not before the Admiral. for his authority is limited to the high sea, and is out of any county: and for these and other oppressions and extortions they were by sentence of the court of Star chamber, fined, and imprisoned, and an award, that restitution should be made, &c.

HIGH

HIGH COMMISSION.

Trin. 9 Jac. 1.

MEMORANDUM, that upon Thursday before the term of Holy Trinity, all the Justices of England were by the command of the King assembled in the Council-chamber at Whitehall, where was also Abbot, Archbishop of Canterbury, and with him two Bishops and divers civilians, where the Archbishop did complain of prohibitions to the High Commissioners out of the Common Pleas, and the delivery of persons committed by them by *Habeas Corpus*, and principally of Sir William Chancey; where I defended our proceedings, according to the Treatise which I made of it, and which I delivered before the High Commissioners: and after great disputation betwixt the Archbishop and me, at the last the Archbishop said, that he had a point not yet touched upon in my Treatise, which would give satisfaction to the Lords, and to us also without question, upon which he would rely; and that was the clause of restitution and annexation, *scil.* "and that all such jurisdictions, privileges, superiorities, and pre-eminencies, spiritual and ecclesiastical, as by any spiritual power or authority hath heretofore, or hereafter lawfully may be exercised or used, for the visitation of the ecclesiastical state and persons, and for reformation, order, and correction of the same, and of errors, heresies, schisms, &c. shall for ever by authority of this present Parliament, be united and annexed to the imperial crown of this realm:" and it was said, that the Kings H. 8. and Ed. 6. gave power by their commissions under the great seal to divers to impose mulcts, &c. in spiritual and ecclesiastical causes, &c. and upon this he concludes, that inasmuch as this had been used before 1 El. this is given to the Queen Elizabeth and her successors: also inasmuch as by the statute of 2 H. 4. and 2 H. 7. the jurisdiction * ecclesiastical may fine and imprison in certain particular causes ecclesiastical, for this cause jurisdiction to fine and imprison in all ecclesiastical causes is given to the King: and this he said he uttered to the intent that this may be answered; to which I for a time gave this answer, that it was good for the weal public,

Prohibitions.
Antea 58, 59,
63, 64. 82, &c.
13 Co. 8, 9, &c.
17, 18, 41, 42,
70.

Antea 32.

Antea 37.

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public, that the Judges of the common law should interpret the statutes, and acts of Parliament within this realm; and that if such interpretation ought to be made, what he urged, was absurd and against law and reason for divers causes.

1. For that if such word (*lawfully*) were omitted, that yet this act, as appears by the title and preamble, being an act of restitution, ought to be intended of lawful jurisdictions, privileges, &c.

2. These words, "heretofore hath, or hereafter lawfully" may be exercised," &c. This word *lawfully* extends as well to times past, as to times future: and all this was affirmed by all the Justices.

3. It was said by me, that before the statute of 1 Eliz. no ecclesiastical Judge may impose a fine or imprison for any ecclesiastical or spiritual offence, unless there be authority by act of Parliament: and this was so affirmed by all the Justices, that although in some cases they may fine and imprison, therefore to say, that by this clause in all cases they may fine and imprison, was so manifest, that it was not worthy any answer: but now I have seen the commission made to Cromwell the King's Vicegerent, and other commissions to others by his appointments, for this, that he was employed in the affairs of the kingdom, in which commission are these words. *Vide* my book of Precedents; the Commission at large.

And afterwards in this very term the Privy Council sent for the Justices of the Common Pleas only, and there the reasons and causes of the said resolution were largely debated; and opposition was made as much as might be by Egerton, Lord Chancellor; but the Justices of the Com. Pleas remained constant in their former opinion; and afterwards the Council sent for the Chief Justice of the King's Bench, Justice Williams, Justice Croke, Tanfield Chief Baron, Snig, Altham, and Bromley, who were not acquainted with the reasons and causes of the said rule of the Common Pleas; nor did they know for what cause they came before the Council; and hearing the Lord Chancellor affirm, that the High Commissioners have always by the act of 1 Eliz. imposed fine and imprisonment for exorbitant crimes (without any conference with us) were of a sudden opinion with us, without any conference amongst themselves, and without hearing of the matter debated: and after at another day this very term, the said Judges of the King's Bench, Barons of the Exchequer, and Justice Fenner and Yelverton, who were omitted before, and we the Justices of the Common Pleas were all commanded to attend the Privy Council; and when we all were assembled,

we

we of the Common Pleas were commanded to retire, for that, as the Lord Treasurer said, we had contested with the King, and in our absence the King and the Prince sat with the Council, and then the Justices of the King's Bench, and Barons of the Exchequer were (questioned) *seriatim* with the Council: and the King demanded their opinions in certain points concerning the high commission, with which they were not acquainted before, which were not related to us. In all which as appears after, they were not unanimously agreed; and after two hours and a half, we the Justices of the Bench, Coke, Walmisley, Warburton, and Foster, were commanded to come before the King, the Prince, and the Council, where the King declared, that by the advice of his Council, and by the advice of the Justices of the King's Bench, and Barons, he will reform the high commission in divers points, * and reduce it to certain spiritual causes, the which after he will have to be obeyed in all points: and the Lord Treasurer said, that the principal feather was plucked from the High Commissioners, and nothing but stumps remaining; and that they should not intermeddle with matter of importance, but of petit crimes; and this word (*errors*) being general, shall be explained, and no obligations shall be taken of the parties, as before absurdly and unjustly (as he said) had been taken, and divers other things were reformed, as he said; but he did not declare them in particular.

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To which it was said by me to the King, that it was grievous to us his Justices of the Bench, to be so severed from our brethren, the Justices and Barons, but more grievous that they differed from us in opinion, without hearing one another; and especially forasmuch as we have proceeded in the case of Sir Will. Chancey, and other cases concerning the power of the High Commissioners in imposing of fines and imprisonment judicially in open court, upon argument at the bar and the bench, where it was resolved by us, that the High Commissioners cannot fine and imprison, but in certain cases; and the judicial course ought to be judicially reversed: but I said to the King, that when we the Just. of the Common Pleas see the commission newly reformed, we will, as to that which is of right, seek to satisfy the King's expectation; and so we departed without any demand of our opinions.

Antea 82.

STOCKDALE's Case.

Trin. 9 Jac. Regis.

In the Court of Wards.

King's grant
void for uncer-
tainty.

See 1 Co. 50.
3 Co. 4. 4 Co.
66. 7 Co. 14.
8 Co. 45, 55.
9 Co. 23, 29, 47.
10 Co. 26. b.
64. b. 112. b.
11 Co. 11.

THE King by his letters patent, dated 9 April, the ninth year of his reign, granted, assigned, and set over to William Stockdale, in these words:

“ Such and so many of the debts, duties, arrearages, and sums of money, being of record in our Court of Exchequer, Court of Wards and Liveries, Court of the Duchy of Lancaster, or within any other court or courts within this our realm of England, or being of record in any of our said courts, &c. in any year, of several years from the last year of the reign of H. 8. until the thirteenth year of our late dear sister, as shall amount to the sum of a thousand pounds, to have, take, levy, recover, and enjoy the said debts, duties, arrearages, and sums of money amounting unto the sum of a thousand pounds, before, in and by these presents given and granted to the said William Stockdale, his executors, administrators, and assigns.”

And in this case divers points were resolved.

1. That the said grant of the King is void for the uncertainty, for by the grant no debt in certain may pass, and if it cannot pass by the grant at the beginning, it shall never pass, as this case is: as if the King hath a hundred acres of land in D. and he grant to a man 20 acres of the land in D. without any describing of them by the rent, or occupation, or name, &c. this grant is void; and in the case of the King the patentee shall not have his election, as he shall in the case of a common person; but in case of the King, if the 20 acres are described, or by abutments, or * by name certain in the particular, this is good demonstration which 20 acres shall pass.

2. Where the patentee claims by force of this word *arrearages*, to have arrearages of rents, reliefs, and mesne rates of lands, &c. in the Court of Wards, &c.

It was resolved clearly, that he shall not have them, if the patent had not gone further; for inasmuch as this word

ar-

arrearages is coupled with these words, debts, duties, and with these words subsequent (sums of money) it shall be intended of arrearages of things personal, and not of things real; as of arrearages of account of monies delivered in prest, &c.

But the proviso in the end of the patent, *scil.* Provided always, that the said William Stockdale shall take no benefit by any means of arrearages of any rents, reliefs, tenths, or annual payments whatsoever, until Sir Patrick Murrey and others be satisfied and paid the sum of 10,000 l. &c. hath well explained what arrearages the King intended, *viz.* of rents, &c. and so to construe one part of the patent by the other; but clearly mean rates, (rents) are not within the said words, for they are the profits of demesne land.

MANSLAUGHTER.

Trin. 9 Jacobi Regis.

DIVERS men playing at bowls at Great Marlow in the county of Kent, two of them fell out, and quarrelled the one with another, and the third man who had not any quarrel, in revenge of his friend, struck the other with a bowl, of which blow he died; this was held manslaughter, for this, that it happened upon a sudden motion in revenge of his friend.

Vide Keeling's
Reports. Rex
ver. Mawgridge.
1 Hawk. c. 30.
per totum.

In the very same term a special verdict, being divers years past found in the county of Hereford, the effect of which;
"that two boys combating together, the one of them was
"scratched in the face, and his nose voided a great quantity
"of blood, and so he run three quarters of a mile to his father, who seeing his son so abused, and the blood run from
"him, and his cloaths and face all bloody, he took in his hand
"a cudgel, and went three quarters of a mile to the place
"where the other boy was, and struck him upon the head,
"upon which he died." And this was held but manslaughter, for the ire and passion of the father was continued, and there was no time that the law can determine that it was so settled, that it shall be adjudged in law malice prepense; and this case was moved *ad mensam*, &c.

* HIGH COMMISSION.

Mich. 9 Jacobi Regis.

Vid. Ant. 19,
47, 76.
13 Co. 9, 47.

MEMORANDUM, That upon Thursday in this term, a High Commission in causes ecclesiastical was published in the great chamber of the Archbishop at Lambeth, in which I with the Chief Justice, Chief Baron, Justice Williams, Justice Crook, Baron Altham, and Baron Bromley, were named Commissioners, amongst all the Lords of the Council, divers Bishops, Attorney and Solicitor, and divers Deans and Doctors of the canon and civil laws; and I was commanded to sit by force of the said Commission, which I refused for these causes:

1. For this, that I, nor any of my brethren of the Common Pleas were acquainted with the Commission, but the Judges of the King's Bench were.

2. That I did not know what was contained in the new Commission, and no Judge can execute any commission with a good conscience without knowlege; and that always the gravity of the Judges hath been to know their commission, for *tantum sibi est permiffum, quantum commissum*: and if the Commission be against law, they ought not to sit by virtue of it.

3. That there was not any necessity that I should sit, who understood nothing of it, so long as the other Judges were there, the advice of whom had been had in this new Commission.

4. That I have endeavoured to inform myself of it, and have sent to the Rolls to have a copy of it, but it was not enrolled.

5. None can sit by force of any Commission, until he hath took the oath of supremacy, according to the statute of 1 Eliz. And for this, if they will read the Commission so that we may hear it, and have a copy to advise upon it, then I will either sit or shew cause to the contrary. But the Lord Treasurer would for divers reasons persuade me to sit, which I utterly denied.

And

See 1 Hawk. c.
14. sect. 1. &
ch. 24. sect. 11.
&c. Oaths to sit
in Parliam. and
ch. 1. sect. 12.
ch. 9. sect. 4.
ch. 19. sect. 27
to sect. 29. and
ch. 24. by offi-
cers, &c.

Part XII.

HIGH COMMISSION.

And to this the Chief Justice, Chief Baron, and some other of the Judges seemed to incline, upon which the Lord Treasurer conferred in private with the Archbishop Bancroft, who said to him, that he had appointed divers causes of heresy, incest, and enormous crimes to be heard upon this day, and for that he would proceed; but at last he was content that the Commission should be solemnly read, and so it was, which contained three great skins of parchment, and contained divers points against the laws and statutes of England: and when this was read, all the Judges rejoiced that they did not sit by force of it: and then the Lords of the Council, viz. the Archbishop, the Lord Treasurer, the Lord Privy Seal, the Lord Admiral, the Lord Chamberlain, the Earl of Shrewsbury, the Earl of Worcester, with the Bishops, took the oath of supremacy and allegiance, and then we as Commissioners were required to take the oath, which I refused until I had considered of it: but as the subject of the King, I and the other Judges also took the oaths of supremacy and allegiance.

Then the Lord Archbishop made an oration in commendation of the care and providence of the King for the peace and quiet of the church, also he commended the Commissioners, also the necessity of the Commission to proceed summarily in these days, wherein sins of a detestible nature, and factions, and schisms did abound, and protested to proceed sincerely by force of it, and then he caused to be called a most blasphemous heretic, and after him another, who was brought hither by his appointment, to shew to the Lords and the auditory the necessity of that Commission.

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Heresy.

Ant. 56, 57.

Postea 93.

And after, the Archbishop came to the Chief Justice and to me, and promised us, that we should have a copy of the Commission, and then I should observe the diversity between the old Commission and this; and all the time that the long Commission was in reading, the oath in taking, and the oration made, I stood, and would not sit, as I was requested by the Archbishop and the Lords, and so by my example did all the rest of the Justices.

And the Archbishop said, that the King had commanded him to sit by virtue of this new Commission, in some open place, and at certain days: and for that cause he appointed the Great Chamber at Lambeth in winter, and the Hall in the summer; and every Thursday in the term-time, at two of the clock in the afternoon, and in the forenoon he would have a sermon for the better informing of the Commissioners of their duty, in the true and sincere execution of their duties.

Fishing in the River THAMES.

Mich. 9 Jacobi Regis.

Rivers. Fish.
See Shep. Abr.
210, 211. and
Nelson's Just.
tit. Fish.

IN this same term the issue in an information upon the statute of 2 H. 6. 15. was tried at the bar, and upon the evidence upon the words of the said act, which are, that every person which setteth or fasteneth in the river of Thames any nets or engines called trincks, or any manner of nets, to any posts, boats, anchors, or the like thing, to stand continually day and night, forfeits to the King one hundred shillings for every time, &c. and the defendants having set and fastened nets called trincks, in the river of Thames, &c. to boats day and night, for so long time as the tide did serve, and did not say *continually*.

The question was, if this was within the statute. And it was clearly resolved, that it was within the statute: for the nets called trincks, cannot stand but for so long as the tide serves: and for this the word *continually* shall be taken continually so long as they may stand to take fish, and as the time of fishing endures, be it in the day or night, for *lex non intendit aliquid impossibile*, for otherwise the law should not be of any effect: and although that it was said, that this statute remains in force, and if any had complained of any offence against it, he shall be punished; but the reason why no execution hath been made of this act, was for this, that none should have benefit by the suit but the King only, for the penalty is only given to the King. And as it doth appear by the preamble in the proviso in the act, the manner of the nets was not the cause of the making of the act, for by the proviso every man may fish in his seasonable time with trincks, if they are of assise, drawing and conveying them with their hands, as other fishers do, and not fastening them to posts, boats, or anchors, &c. continually to stand; for the mischief was by fastening them, and the
standing

standing of them continually, the brood and fry of fish were destroyed, and disturbance made to common passage of vessels, as weers, lidels, and other engines.

* SHULTER's Case.

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Mich. 9 Jac. Regis.

In the Star-Chamber.

IN Camera Stell. the case was such; "John Shulter of
" Wisbich of the age of 115 years had issue John his eldest
" son, and others, *viz.* Christopher, Richard, &c. and being
" seised of lands in fee of the value of a hundred marks *per*
" *annum*, his eldest son being dead, and his grandchild John
" being within age he intended, and so gave directions to
" make a lease of a farm called Roushall to Christopher, dur-
" ing the minority of his grandchild, rendering the ancient
" rent, with power of revocation: and of land in Yarbury
" to the said Richard, in the same manner, and for the same
" time: and Christopher and Richard by the covin and aid
" of one Woodroof a scrivener, 24 Eliz. drew and ingrossed
" two several leases of the premises severally to Christopher
" and Richard, for one and fifty years, rendering rent but
" four-pence *per ann.* and without any power of revocation:
" and John Shulter the grandfather could read and write very
" well, but by reason of his great age was blind; and Wood-
" roof declared to him, that the effect of the said leases were
" in all points according to his direction: and upon this the
" said John Shulter, the grandfather, sealed and delivered as
" his deeds."

A blind man
seals a deed read
falsly. See 2
Co. 3. and 9. b.
1 Jon. 314.
Moor 182.
1 Roll. R. 440.
4 Leon. 62.

And it was resolved by the Lord Ellesmere Chancellor, and the two Chief Justices, that the said indentures could not bind the said John Shulter, for this, that he was blind and like to one who could not read at all; and that the effect being declared unto him in other manner than in truth the indentures were, it did fully agree with Manser's case, in the Second Part of my Reports, fol. 4.

Sir ANTHONY ASHLEY's Case.

Mich. 9 Jac. Regis.

Conspiracy.

See Nelf. Abr.
35, 484.
1 Danv. 207,
208, &c.
1 Hawk. c. 72.

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BETWEEN Sir Anthony Ashley, Knight, plaintiff, and Sir James Creighton, Knight, Hercules Hunnings, John Cantrell servant of Hunnings, Thomas Hampton, Archibald Sterling, servant to Sir James Creighton, Hen. Smith, Mary Rice, and divers others defendants, the case was thus:

“ Sir James Creighton had bought a pretended right of
 “ and in the manor of Lyddy and Millisent, and divers other
 “ lands of which Sir Anthony had long possession; upon
 “ which divers motions were made concerning fines acknow-
 “ leged to be staid, &c. in the Common Bench, and Sir
 “ James Creighton not prevailing in it, and Sir Anthony, for
 “ divers misdemeanors only, heard before the Lords of the
 “ Council, at the Council table, being discharged to be one
 “ of the Clerks of the Council and in great disgrace, he en-
 “ tered into a wicked and damnable conspiracy with the
 “ other * defendants, to accuse the said Sir Anthony of
 “ some heinous and capital crime, by which he should for-
 “ feit all his land to the value of two thousand marks *per an-*
 “ *num*, and his goods and chattels to a great value, which
 “ they should share amongst them: and in the end, Henry
 “ Smith, who had been servant to Sir Anthony, was sub-
 “ orned by the said Sir James, and others, to accuse the said
 “ Sir Anthony of the murder of one William Rice who was
 “ the husband of the said Mary Rice, one of the defendants,
 “ which William Rice was dead above eighteen years before,
 “ upon surmise made by Sir James Creighton, that after the
 “ attainder of Sir Anthony Ashley, Smith should have a por-
 “ tion of five hundred pounds in money; and that Sir James
 “ should procure of his uncle, the Capt. of the Guard, a place
 “ of the Guard in ordinary, and procure the K. to grant protec-
 “ tion to the said Smith against his creditors, and a general
 pardon

“ pardon of all offences ; but he would not make any accusation of the said Sir Anthony until he had assurance of it ;
“ and upon this, articles by writing indented, were drawn
“ and ingrossed by one Thomas Wood, a scrivener, who
“ dwelt in an obscure place about the Tower, made between
“ Sir James Creighton of the one part, and the said John
“ Cantrell, servant to Hunning, by the consent of Smith,
“ and to his use on the other part ; by which Sir James covenanted, that the said John Cantrell and his heirs, after the
“ conviction and attainder of Sir Anthony Ashley, shall have
“ the sixth part of his manors, lands, tenements, and hereditaments, goods and chattels in six parts to be divided,
“ in consideration that Cantrell covenanted, &c. that he
“ should procure witnesses to convict the plaintiff of murder,
“ or other capital crime, and to deliver to Sir James Creighton a true particular of all the lands, goods, and chattels
“ of Sir Anthony, which articles were sealed and delivered
“ by Sir James Creighton, 16 February *anno 7 Jac.* And at
“ the same time he was bound to Cantrell in an obligation of
“ eight thousand pounds for performance of the said articles,
“ and after, within two days after the said articles were sealed and delivered, Hen. Smith counterfeited himself to be
“ sick, and then he revealed the said murder in discharge, as
“ he pretended, of his conscience, and accused himself of
“ poisoning of the said William Rice, by the commandment
“ of the said Sir Anth. Ashley. so that he himself was the
“ principal ; and upon this Sir James Creighton procured
“ the said Mary Rice, late the wife of the said William Rice,
“ to prefer a petition to the King, importing the accusation
“ aforesaid : the King referred the petition to the Chief Justice of the King’s Bench, to examine the cause and the
“ witnesses on both sides, the which he did, and certified
“ the King that he had found a false conspiracy, to indict
“ Sir Anthony without any just ground ; and certified also
“ the effect of the said articles ; upon which the King after
“ conference with his Privy Council, and by their advice,
“ thought the matter necessary to be heard and sentenced in
“ the Star-chamber, the which matter upon ordinary proceedings was heard by six days in the very same term : and it was
“ objected by the counsel of the defendants, that the bill upon
“ the said conspiracy did not lie, and that it should be dangerous to maintain it ; for if it should be lawful for every
“ one who is accused, or was in fear to be accused of any capital
“ crime, to exhibit his bill in this court against the accuser
“ and all the witnesses, and by many captious and intricate
“ interrogatories severally to examine them, to find contrariety

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See 1 Hawk.
ch. 72.
sect. 1, 2, 3, &c.
Qr. 11 Co. 29.

“ in them in circumstances ; this will deter men to prosecute
“ against great offenders, and thence great offences will pass
“ unpunished, which will be dangerous to the weal public,
“ and by the law, conspiracy lies when a man is indicted,
“ and *legitimo modo acquietatus* : but here he was never in-
“ dicted, and * for that it may be, that Sir Anthony is guilty
“ of the said crime, and then are all mouths stopped to say
“ the contrary.”

But to that it was answered and resolved by the Lord Chancellor, the two Chief Justices, and all the court, that in this case the bill was maintainable, although that the party accused was not indicted and acquitted before, as it was resolved in this court, *Hil. 8 Jac.* in Poulter's case, and for the reasons and cautions there expressed ; also in this case at the bar, be Sir Anthony guilty or not guilty of the said murder, yet the defendants are punishable for the great and heinous misdemeanor and conspiracy, *scil.* for promising of the said bribes and rewards to suborn the said Henry Smith to accuse the plaintiff of the said murder eighteen years passed, and the articles in writing to share and divide the estate of Sir Anthony after the attainder ; for this corrupt conspiracy, and great and perilous practice and misdemeanor, the defendants shall be punished, let Sir Anthony be guilty or not in the said crime. And it is a great indignity offered to the King for any subject, to presume to covenant or assume, that the King shall grant protection or pardon, or that the estate of any man shall be shared and divided before his attainder.

The grand pox.

So that although that the court will not enter into the examination of the crime, yet it appears by the testimony of a great number of witnesses, that the said William Rice did not die of any poisoning, but of another horrible disease, that he had got by his wicked and dissolute life, which with reverence cannot be spoken.

Suspicion.
Co. Lit. 6. b.
Rep. Q. A. 247.

And in this case it was resolved, that if felony be done, and one hath suspicion upon probable matter that another is guilty of it, because that he had part of the goods robbed, and is indigent, or if the party be indicted, or if murder be committed, and one is seen near the place, or coming with a sword or other weapon embued with blood, or that he was in company of felons, or hath carried the goods stolen to obscure places, or such like things, these are good causes of suspicion, and by reason of this he may arrest the party so suspected, to the end that he may subject him to justice.

But in this case three things are to be observed.

1. That

Part XII. Writ De Heretico comburendo.

1. That a felony be done.
2. That he who doth arrest, hath suspicion upon probable cause, which may be pleaded, and is traversable.
3. That he himself, who hath the suspicion, arrest the party.

2 Hawk. c. 12,
Sect. 12. c. 15.
Sect. 41, 42, &c.
cap. 45. sect. 7.
and 46. sect. 42.

For he cannot command another to do it, for *suspicion* is a thing individual and personal, and cannot extend to another person than to him who hath it.

Also it was resolved, that if felony be done, and the common fame and voice is that one hath committed it, this is good cause for him who knows of it to arrest the party, to the intent that he may be brought to justice; but none can arrest the party suspected by the command of him who hath the suspicion; and with this agrees the book in 2 H. 7. 15, 16. 15 H. 7. 5. 20 H. 7. 12. 21 H. 7. 28. 7 Ed. 4. 20. 8 Ed. 4. 27. 11 Ed. 4. 4. 6. 17 Ed. 4. 5, 6. 20 Ed. 4. 6. b. 7 H. 4. 25. 27 H. 8. 23. 26 H. 8. 9. 7 El. Dy. 226.

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Hil. 9 Jac. 1.

IN this very term, the Attorney and Solicitor consulted with me, if at this day upon conviction of an heretic before the Ordinary, this writ *De Heretico comburendo* lieth; and it seems to me clearly that it doth not, for the reasons and authorities that I have reported, *Trin. 9 Jac. fol. 73*. And after they consulted with Fleming, Chief Justice, Tanfield, Chief Baron, Williams and Crook; and they upon the report of Dr. Cofins, mentioned in my said report, and upon certain precedents which passed in the time of Queen Elizabeth, upon former precedents, although the statute of 2 H. 4. was enforced, and without consideration (as I have heard) of the authorities cited by me in my said report, they certify the King, that a writ *De Heretico comburendo* lieth upon a conviction before the Ordinary, but that the most convenient and sure way was to convict the heretic before the High Commissioners.

Breve de Heretico comburendo, lieth not at this day, &c.
5 Co. 23, 58.
St. 2 H. 4. c. 15.
Vide Ant. 28, 56, 57.
1 Hawk. c. 2.
Sect. 10, 11.
H. H. P. C. 391.

Note, this writ *De Heretico comburendo*, with all process thereon, is now entirely abrogated by stat. 29 Car. 2. c. 9.

? *Who?*
not have been
given as part
The of Lord Coke.

The Lord V A U X's Case.

Pasch. 10 Jac. 1.

Premunire,
antea 37, 38.
See 1 Hawk. ch.
19. & ch. 79.

IN this term, the Lord Vaux was indicted of a *Premunire* in the King's Bench upon the new statute for refusing the oaths of allegiance, and upon this he was arraigned, and prayed that he might be tried *per pares*.

2 Inst. 45.

But it was resolved, that he shall not in this case be tried by his Peers, for the statute of *Magna Charta*, cap. 29. *Nec super eum ibimus, nec super eum mittemus, nisi per legale judicium parium suorum*, is only to be understood of treason, petit treason, and felony, and of accessories to them, &c. But *premunire* is but a contempt, and pardon of all contempts pardons it; and for this cause it shall not be *per pares*.

And upon this the Lord Vaux did confess the indictment. *Vide Lamb. Just. del pace 520.* Dallison's report accordingly; that of riots, routs, unlawful assemblies, &c. a peer of the realm shall not be tried *per pares*. *Vide Stamford, &c.*

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Trin. 10 Jac. 1.

Of contempts.
See 1 Hawk.
ch. 21. per tot.
ch. 22. sect 2, 3,
4. ch. 23. sect.
1, 2, 3, &c. ch.
24. sect. 2, 3, 4.
2 Hawk. ch. 10.
Sect. 15, 17, 19.

IN this term, before a select council, at York House, *scil.* the Lord Chancellor, the Archbishop, the Duke of Lenox, the Earl of Northampton, Lord Privy Seal, the Earl of Suffolk, Lord Chamberlain, the Earl of Worcester, the Earl of Pembroke, Viscount Erskin, Viscount Rochford, the Lord Zouch, the Lord Knolls, the Lord Wootton, the

Part XII. Countess of SHREWSBURY's Case.

the Chancellor of the Exchequer, the Chancellor of the Duchy Fleming Chief Justice of the King's Bench, Philips Master of the Rolls, Coke Chief Justice of the Common Pleas, and Tanfield, Chief Baron.

The Countess of Shrewsbury (the wife of Gilbert, Earl of Shrewsbury) then prisoner in the Tower, was brought before the said Lords, and by the Attorney and Solicitor of the King, was charged with a high and great contempt of dangerous consequence; for they declared that the Lady Arbella, being of the blood royal, had married

Seymour, second son of the Earl of Hertford, without privy or assent of the King, for which contempt the said Seymour was committed to the Tower, and had escaped and fled beyond the seas; the Lady Arbella being under restraint escaped also, and embarked herself upon the sea, and was taken before she got over; of which flight of the said Lady Arbella, the said Countess being her aunt, very well knew and abetted, as is directly proved by Crompton, and not denied by the Lady Arbella: and admit it, that the Lady Arbella had no evil intent against the King (who had always a great and special care of her, and was very bountiful unto her, until her marriage with the said Seymour, which was the *pomum vetitum*.) yet when she fled, and when she should be environed with evil spirits, *cum perversis perverti possit*, and when she shall be in another sphere, she will not move within the same orb.

Accessorium in-
nocenti.

Q If illegal?

Quid possit non
est.

And the Lords of the Privy Council knowing the *arcana imperii*, did shew divers perilous consequences, and the rather for this, that the said Countess is an obstinate popish recusant, and as was said, perverted also the Lady Arbella.

Quid profunt
legi?

Now the charge was in two points.

1. That the said Countess of Shrewsbury, by commandment of the King, being called to the Council table, before the Lords of the Council at Whitehall, and there being required by the Lords to declare her knowledge touching the said points, and to discover what she knew concerning them, for the safety of the King, and quiet of the realm; she answered, that she would not make any particular answer; and being again asked by the King's command by the Council at Lambeth, and being charged again to answer to the said point, she refused for two causes.

Univoca æqui-
voca.

Particulare ad
generale.

- I. For that she had made a rash vow that she would not declare any thing in particular touching the said points;

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points ; and for that (as she said) it was better to obey God than man

- * 2. She stood upon her privilege of nobility, *scil.* to answer only when she was called judicially before her Peers, for that such privilege was allowed (as she said) to William Earl of Pembroke, and to the Lord Lumley.

2. The second point of her charge was, that when such answer which she had made was put in writing, and read to her, yet she refused to subscribe to it ; which denial to discover and discharge her conscience in a case which toucheth the safety of the King, and quiet of the realm, was urged by the King's council to be a great and high contempt, and that nobility hath not any such privilege as is alleged, nor any such allowance as was supposed ; and that rash and illegal vows make not an excuse, and that this precedent being now upon the stage, was of very dangerous consequence : and the said Countess hearing the charge, yet persisted in her obstinate refusal, for the same reasons and causes upon which she had insisted before : and the Lord Chancellor began, and the Archbishop, and all the other Lords began with the first, and adjudged it a great and high contempt, and the Lord Chancellor said, that that was against the law of England, with which all the Lords agreed.

And that no such allowance was given to the said Earl of Pembroke, or to the Lord Lumley in respect of their privilege of nobility, but that they were *voces populi, & ideo non audiendæ* : and the lord Archbishop principally proved, that as well the contempt, as the said rash vow was against the law of God, which he and the Earl of Northampton principally proved by divers texts and examples in holy Scripture.

And the effect of all that which the three Justices said, was, that after the sentences of all the learned, prudent, and honourable personages and Counsellors of estate, they might well be silent ; but in regard that *silentium in senatu est vitium*, they would speak something briefly, viz.

That three things in this case are to be well considered.

1. Whether the refusals aforesaid of the said Countess were offences in law against the King, his crown and dignity.
2. What manner of proceeding this is, and whether it was justifiable by precedent or reason.

3. What

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3. What is the demerit of the offences, and how punishable.

As to the first, it was resolved by the Justices and Master of the Rolls, that the denying to be examined was a high and great contempt in law, against the King, his crown and dignity; and that if it should be permitted, it would be an occasion of many high and dangerous designs against the King and the realm, which cannot be discovered: and upon hope of impunity it will be an encouragement to offenders, as Fleming Justice said, to enterprize dangerous attempts.

And the Master of the Rolls said, that it was not any privilege of nobility, to refuse to be examined in this case, no more than of any subject.

Also, if one that is noble, and a Peer of the realm, be sued in the Star-chamber, or in Chancery, they ought to answer upon their oaths, and may be examined in the Star-chamber upon interrogatories upon their oaths: and if one who is noble be produced as a witness between party and party, he ought to be sworn, or otherwise his testimony is of no value; and so is the common experience in the said courts: and the Chief Justice said, that forasmuch as where order is neglected, confusion will follow, he would recite some of the honourable privileges which the law of England (more than any other law) attribute to the nobility* of England in legal proceedings; and they will not be impertinent, but give a great light to the case now in hand.

Nemo tenetur, &c.
Quære the ex officio oath ant.
26, 27.

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1. If a Baron, Viscount, Earl, or other Lord of Parliament and Peer of the realm be plaintiff in any action, and the defendant will plead that the plaintiff is not a Baron, Viscount, Earl, &c. as he is named in the writ, this shall not be tried at the common law by jury, who may be corrupted, nor by witnesses, as in the Star-chamber, or Chancery, who may be suborned; but it shall be tried by the record in Chancery, which imports by itself solid truth; so great regard hath the law to the trial of their honour and dignity, &c.

Parliament cases
2, 3, &c.
2 Salk. 509, 510.

2. Their persons have many honourable privileges in law.

1. At the suit of a subject their bodies shall not be arrested, neither *Capias* nor *Exigent* lieth against them.

2. For the honour and reverence which the law gives to nobility, their bodies are not subject to torture *in causâ criminis læsæ Majestatis*.

3. They

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3. They are not to be sworn in assises, juries, or other inquests.
4. If any servant of the King, named in the cheque-roll, compass or intend to kill any Lord of Parliament, or other Lord of the King's council, this is felony.
5. In the Common Pleas, a Lord of Parliament shall have Knights returned on his jury.
6. He shall have day of grace.
7. A Lord of Parliament shall not be tried in case of treason, felony, or misprision of them, but by those who are noble and Peers of the realm.
8. In trial of a Peer, the Lords of Parliament shall not swear, but they give their judgment *super fidem et ligeantiam domino Regi debitam*, so that their faith and allegiance stands in equipage with an oath in the case of a common person in trial of life: and the writs of Parliament directed to the lords of Parliament, are *sub fide & ligeantia, &c.* And the reason and cause that the King gives them many other privileges, is for this, because all honour and nobility is derived from the King as the true fountain: and the King honours with nobility, for two causes.

1. *Ad consulendum*, and for that reason he gives them a robe.

2. *Ad defendendum Regem et regnum*, and for that cause he gives them a sword.

And forasmuch as they derive their dignities, accompanied with all those honourable privileges from the King, to deny to answer, being required thereto by the King, to such points as concern the safety of the King and quiet of the realm, is a high contempt and disobedience, accompanied with great ingratitude.

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* This denial is *contra ligeantiam suam debitam* against the faith and allegiance of a person noble, due to the King, and and which the law greatly esteems.

And that this denying is against her faith and allegiance appears by the ancient oath of allegiance, which is imprinted in the heart of every subject, *scil. Ero verus & fidelis, et veritatem præstabo domino Regi de vitâ et membro, et de terreno honore, ad vivendum et moriendum contra omnes gentes, &c. Et si cognoscami aut audiam de aliquo damno aut malo quod domino Regi evenire poterit, quod non revelato, &c.* And this oath of alle-

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allegiance is common to all subjects, as well those of the nobility as commonalty : but the law hath greater account of the faith and allegiance of a nobleman, than of one of the Commons, for this, that the breach of their allegiance is more dangerous to the King and estate, for *corruptio optimorum est pessima* ; and for this reason, the Countess by her allegiance was bound, without being demanded, to reveal to the King what she knows concerning the premises, upon which great mischief may happen to the King and the realm. But being commanded by the King to declare her knowledge, the denying of it doth greatly aggravate the offence.

Qui contemnit præceptum, contemnit præipientem.

Command and obedience are the ligament of government, and *ligeantia est legis essentia* ; for without allegiance and obedience, the law cannot proceed.

As to the second point, viz. concerning the manner of this proceeding.

1. Privative, it is not to fine and imprison, or inflict corporal punishment upon the Countess, for fine and imprisonment ought to be assessed in some court judicially.

2. Positive, the fine is *ad monendum*, or at the most *ad minandum* ; it is *ad instruendum non ad destruendum*.

This selected council is to express what punishment this offence justly deserved, if it be judicially proceeded within the Star-chamber ; for which reason this manner of proceeding is out of the mercy and grace of the King against this honourable Lady, that she seeing her offence may submit herself to the King without any punishment in any court judicially.

If sentence shall be given in the Star-chamber according to justice, you the Lords shall be agents in it : but in this manner according to the mercy of the King, the King is only agent ; the law hath put rules and limits to the justice of the King, but not unto his mercy, that is transcendant and without any limits of the law ; *et ideo processus iste est regalis plane & rege dignus*.

Also inasmuch as the allegiance and obedience of the subject, is the best flower in his imperial garland, to the intent, that it may neither be blasted, nor impaired by this dangerous example, to the prejudice of his royal prerogative and posterity, this proceeding hath been thought
neces-

Vide the Earl of
Essex's case,
42 & 43 Eliz.
424.
See Camden's
Eliq.

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necessary: and this is fortified by the precedent of the Earl of Essex, against whom such proceedings were in this very place, *anno* 42 & 43 *Eliz. Reg.*

And as to the last point it was resolved by all *quasi una voce*, that if a sentence should be given in the Star-chamber judicially, she should be fined twenty thousand pounds, and imprisoned during the King's pleasure. *Vide antea* 69, &c.

Hoc in terrorem, sed quære quid inde venit?

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* ROBERT SCARLET's Case.

Trin. 10 Jacobi Regis.

Grand jury.
See 2 Hawk.
ch. 25. sect. 15.
&c. to 32.

NOTE, that at a sessions of peace held lately at Woodbridge in the county of Suffolk, the Sheriff returned a grand inquest, of which one Robert Scarlet in the county of Suffolk had requested to be one, but the Sheriff knowing the malice of the man, refused to return him; but notwithstanding by confederacy with the Clerk who read the panel, he was sworn of the grand inquest, and was not returned by the Sheriff; and being amongst them of the grand inquest, and as one of them, of his malice, and upon his own knowledge, as he pretended (to whom the rest gave credit) indicted seventeen honest men, upon divers penal laws; and some of the Justices looking over the bills found by the grand inquest, and perceiving so many honest men to be indicted, as they did think, maliciously, demanded of them of the inquest, what evidence they had to find the said bills, and they answered, by the testimony and cognizance of one of themselves, *scil.* of Robert Scarlet: and upon examination it did appear, that the said Robert Scarlet was not returned, but that he, by confederacy betwixt him and the Clerk, procured himself to be sworn of the said grand inquest, with intent to indict his neighbours maliciously, for which offence he was indicted at summer assises, *anno* 10 *Jacobi*, held at Bury, upon the statute 11 Hen. 4. cap. 9. by which it is provided, that no indictment shall be found by any persons named

Co. Inst. 3, 32,
33.
2 Hawk. p. 218.
Hale's P.C. 202.

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named to the Justices, without due return of the Sheriff, but by inquest of lawful liege-people of the King, in such manner as was used in the time of his noble progenitors, returned by the Sheriff, &c. without any nomination, &c. And if any indictment be made hereafter in any point contrary, that the indictment shall be void, and for ever held nul.

And upon this act of 11 H. 4. the said Robert Scarlet was indicted, and he pleaded not guilty. And all the especial matter aforesaid was proved in evidence, and upon this he was found guilty by a substantial jury: and in this case consideration was had of divers points.

1. Whether the Justices of Assise have power to punish this offence, or no; and it was held affirmatively, *scil.* by force of their commission of *Oyer and Terminer*, for that the said commission gives them power *ad inquirendum inter alia de omnibus falsitatibus, negligentis, &c. et aliis malefactis, offensis et injuriis quibuscunque*, and of them to hear and determine; and this is understood as well of offences against an act of Parliament, as against the common law; and for that that it is commonly used, that indictments of non-residency of Parsons, Vicars, &c. upon the statute of 21 H. 8. are taken before the Justices of Assise, by force of this word in the said commission of *Oyer and Terminer*, *viz. negligentis, &c.* so that if the act be indefinite or general, and doth not give jurisdiction to any certain courts in special (for then the act is to be pursued) the general words of the commission of *Oyer and Terminer* extends to it: and it is well observed, that in the commission of the peace, the said general words, *scil. de omnibus & singulis aliis malefactis & offensis* have a qualification, *scil. de quibus Justiciarii de pace legitime inquirere possint aut debent*, which limitation proves the large extent of * the words, Page [99] when they stand without any qualification.

Vide 7 Eliz. Dyer, Commissioners of *Oyer and Terminer* may enquire of offences against penal statutes, unless that the statute appoints them to be determined in any court of record? and the opinion there, that in any courts of record of the King, are restrained to the four ordinary courts of record at Westminster, is not held for law; and continual experience hath been always against it, as the statute of 5 Ed. 6. 14. of forestallers, ingrossers, regrators, gives the penalty to be recovered in any court of record: and Justices of Assise in respect of their commission of *Oyer and Terminer* have always

ROBERT SCARLET's Case. Part XII.

enquired of them, the statute 33 H. 8. 9. of unlawful games, and the statute of woods 35 H. 8. cap. 17. and many other statutes; and so the *quære* is well resolved in 7 Eliz. for the opinion of Eallin, Saunders, and Whiddon, there, is held at this day for good law.

2. The second consideration was had upon the statute of 11 H. 4. cap. 9. and it was held, that the said Robert Scarlet was an offender within the statute, for it is to be understood, that the said statute is partly affirmative of the common law, and partly a new law.

In affirmance of the common law, in part privative, no indictment shall be found by any person named to the Justices; and in part positive, but by inquest of lawful people of the King, returned by the Sheriff. And that this was in affirmance of the common law, the statute proves it, in the manner as was used in the time of his noble progenitors; and in the preamble it is said, against the course of common law used and accustomed before this time: and that the said Robert Scarlet was an offender against the said act, for this, that he knowing he was not returned of the grand inquest, procured himself by false conspiracy to be sworn, as is aforesaid: and although that a person solely was in such undue and unlawful manner sworn of the grand inquest, yet this was within the act; and by consequence an offence against the common law, for that malice and falseness alone may be of great mischief, as appears in this case.

Vide antea 23,
90, 91, &c.

3. The third consideration was had of 3 H. 8. 10. which alters the said act of the 11 H. 4. in part, as to denomination; for by the act of the 3 H. 8. the Justices of the Gaol-delivery, or Justices of Peace, of whom one to be of the *quorum*, in open court may alter the panel returned by the Sheriff to enquire for the King only, by addition or extraction of any jurors so returned; and they have power to command the Sheriff to put others in the panel, according to their discretion: and the Sheriff ought to return the panel so reformed upon the penalty of the said act, so that none can be of any grand inquest but by the return of the Sheriff; and for this, the act of 3 H. 8. cap. 10. hath not altered the law, as to the offence of Robert Scarlet.

4. The said act 11 Hen. 4. hath made a new law, *scilicet*, That any indictment found against the act shall be void, which branch doth not make void any indictment or presentment, that in the nature of an indictment found any point contrary to the said act, is made void by the said

Part XII. BAKER and HALL's Case.

said act, so that this may draw in question all the indictments found at the same sessions: and for this, judgment was given that he should be fined and imprisoned.

* BAKER and HALL's Case, Page [100]

Trin. 10 Jac. 1.

NOTE, that upon consideration of the statute of 3 H. 7. cap. 14. it was resolved by Coke, Chief Justice of the Common Pleas, Yelverton, Williams, Snig, and others; that whereas it is provided, that what person soever who takes a woman so against her will, &c. although that the body of the act extend to taking only, yet in respect of this word (*so*) it hath relation to the preamble (to such person as is described in the preamble, *scil.* having substance) it was agreed by all, that if the wife hath nothing, nor is heir apparent, it is out of the statute, for the statute would not have been so curious in describing the person, and all in vain.

2. This word (*so*) relates to the quality and event of the taking mentioned in the preamble, *scil.* "to be married or defiled;" for if she be not married or defiled, it is not such a taking (*so*), *id est*, so married, or so defiled; and it is not reasonable that (*so*) shall have relation to the taking, which is more remote, and not to the marriage or the defiling, which is nearer, *quod fuit concessum*, &c. and clergy is taken away by the statute of 38 Eliz. cap. 9. for principals or procurers before, *vide* Stamford, fol. 37. b. accordingly: and so was the law taken in the 3 & 4 Ph. & Mar. as Justice Dallison reported. *Vide* Lamb. 252. Justice of Peace

Note, the receivers of the woman are principals, but not the receivers of them who took the woman, for these are but accessories. *Vide* Lamb. *ibid.*

Star-chamber.
Women taken
against their
will. Antea 20.
1 Hawk. ch. 41.
per tot.
2 Hawk. ch. 23.
2 Inst. 434, 435.
3 Inst. 61.
Farr. 102, 132.
State Trials,
vol. 4.

Antea 21.

PRIVILEGE of PRIESTS.

* 9 Co. 66.

1 Salk. 78.

† 4 Inst. 323.

2 Inst. 3, 4.

6 Mod. 53.

NOTE, that I saw a report in the time of Queen Mary, upon the statute 50 Ed. 3. cap. 5. 1 R. 2. cap. 15. concerning the * arresting them of holy church, that the said statutes are but an affirmance of the common law, and in maintenance of the † liberties of holy church, as appears by the preamble of the same statutes, and there held, that *eundo, redeundo, et morando*, for to celebrate divine service, the Priest ought not to be arrested, nor any who aid him in it; as the case was of one who administered to the Priest to sing mass; and that the party grieved may have an action upon the statute 50 Ed. 3. for when any thing is prohibited by an act, although that the act doth not give an action, yet action lieth upon it; as upon the statute of Marl. which prohibits to take in the highway; or *Articuli super Chartas*, c. 3. which prohibits the court of Marshalsea to hold plea, &c. although that these acts do not give action, yet an action lieth. 7 H. 6. 30, &c. and the statute 2 H. 5. which commands a libel to be delivered, 4 Ed. 4. 37. *Vide Regist. in Breve super stat.*

C R O W N.

NOTE, if a man be convicted, or hath judgment of death for a felony, he shall never answer by the common law to any felony done before the attainder, so long as the attainder remains in force, *vide* 8 Eliz. cap. 4. 18 Eliz. 7. And at this day, if a man be adjudged to be hanged, and hath his pardon, he shall never answer to any felony before, for he cannot have two judgments to be hanged. *Aliter*, if the first attainder be reversed by error. so if a man be outlawed, and by that attainder of felony * he cannot be arraigned of any felony before, for he cannot be twice attainted. *Vide* 10 H. 4. Coron. 227. *Case del Appeal, &c.*

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ESTRAY.

ESTRAY.

A MAN seised of a manor to which he hath stray appendant by prescription, &c. by his bailiff he seiseth an ox as a stray within the manor, and makes proclamations according to law; and within the year and day lets the manor with all royalties, liberties, &c. and after the year and day passed: and Dyer, Serjeant, did move the court who should have the estray; and Brown, Justice, was of opinion, that the lessor should have it, forasmuch as he had the possession; and when the year and day are passed the propriety shall have relation to the time of the first seizure: but all the Justices were against him, and that the lessee shall have it, forasmuch as the propriety of the stray is not altered nor changed before the year and day: and the lord of the manor, until the year and day are past, hath but the custody, so that the owner may rehave it always within the year and day, if he will pay for the meat of it: nor can the ox be laboured, or used by the lord before the year and day, and therefore he shall be paid for the meat, unless it be such a beast as of necessity ought to be used as a milch-cow, &c. And it was held, that if one take a stray, and within a year and a day it strays out of the manor, the lord may retake it by seizure, &c.

See Lex Maner-
rior, 78, 79, &c.
2 Cro. 513.

DOCTOR HUTCHINSON'S CASE.

Simony.

IN the case of Dr. Hutchinson, Parson of Kenn, in the county of Devon, it was resolved *per totam curiam*, that if any should receive or take money, fee, reward, or other profit, for any presentation to a benefice with cure, although in truth he which is presented be not knowing of it, yet the presentation, admission, and induction, are void *per expressa verba statuti* of 31 Hen. 8. cap. 6. and the King shall have the presentation *hac vice*, for the statute intends to inflict punishment upon the patron, as up-

Stat. 31 Eliz.
Vide antea 74.
Watson's Cler-
gyman chap. 5.
per tot. & p.
48, 96, 97, 146,
&c.

on the author of this corruption, by the loss of his presentation, and upon the incumbent, who came in by such a corrupt patron, by the loss of his incumbency, although that he never knew of it; but if the presentee be not cognizant of the corruption, then he shall not be within the clause of disability in the same statute: and so it was resolved by all the Justices in Fleet-street, *Mich. 8 Jac. fol. 7. vide verba statuti*, which are very well penned against the avarice of corrupt patrons.

HUGH MANNEY's Case.

Perjury.
See 1 Hawk.
ch. 29. per tot.

IN an information in the Exchequer against Hugh Manney, Esq. the father, and Hugh Manney the son, for intrusion and cutting of a great number of trees in the county of Merioneth, the defendants plead not guilty: and Rowland ap Eliza, Esq. was produced as a witness for the King, and deposed upon his oath to the jurors, that Hugh the father and the son joined in sale of the said trees, and commanded the vendees to cut them down, upon which the jurors found for the King with great damages; and judgment upon this was given, and execution had of a great part.

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1 Hawk. p. 172,
173, &c.
2 Hawk. p. 395.
433.

And Hugh Manney the father exhibited a bill in the Star-chamber at the common law, against Rowland ap Eliza, and did assign the perjury in this, that the said Hugh the father did never join in sale, nor * command the vendees to cut the trees; and the said Rowland ap Eliza was by all the lords in the Star-chamber convicted of corrupt and wilful perjury: and it was resolved by all that it was by the common law punishable before any statute: and although that the witness depose for the King, yet he shall the rather be punished than for another; for the King is the head and fountain of justice and right; and he, who perjures himself for the King, doth more offend than if it was in the case of a subject.

H A Y E's Case.

In Curia Wardorum.

BY inquisition in the county of Middlesex, anno 6 Jac. by virtue of a *Diem clausit extremum*, after the death of Humphrey Wilward, it was found that the said Humphrey died seised of a messuage and 26 acres of land in Stepney; and that John Wilward was his heir, and of the age of 14 years and 9 days; and that the land was held of the King *in capite*, by knight's service. John Wilward died within age, and by inquisition in *Mid. 8 Junii anno Jac* by virtue of a writ of *Devenerunt*, after the death of the said John Wilward, it was found that the said John died seised in ward to the King, and that the said messuages and lands at the time of the death of the said John, were holden of the Dean of Paul's, as of his manor of Shadwell.

Diem clausit extremum.
13 Co. 48, 49,
50, 72.

All the mesne rates incurred in the life of John Wilward, are paid to the King.

The questions are,

1. Whether by the death of the said John, and finding of the mesne tenure in the *Devenerunt*, the first office granted to Points be determined?
2. Whether the tenure found by the office may be traversed?

And as to these questions, it was resolved by the two Chief Justices and Chief Baron, that where the said John died, the office found by force of the said writ of *Diem clausit extremum*, after the death of Humphrey Wilward, whereby the King was entitled to the guardianship of the said John, hath taken its effect and is executed, and does remain as evidence for the King after the death of the said John, but nevertheless is not traversable, for it is traversable during the time it remains in force only, and the jurors upon the *Devenerunt* after the death of the said John, are at liberty to find the certainty of the tenure, and they are not concluded by the first inquisition, for they are sworn *ad veritatem dicendum*; and with this agrees 1 H. 4.

Award of CAPIAS UTLAGATUM, &c. Part XII.

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Note.

68. And all this appears by the diversity between the writ of *Diem clausit extremum*, and the writ of *Devenerunt*: and it is to be observed, that there is no difference between the writ of *Diem clausit extremum*, and the writ of *Devenerunt*, but in one point, to wit, the * *Diem clausit extremum* is general, viz. *quantum terrarum et tenementorum idem H. tenuit de nobis in capite, &c. die quo obiit, & quantum de aliis generally*; and the *Devenerunt* recites *quod J. filius & hæres H. qui de nobis tenuit in capite, nuper dum fuit infra ætatem, in custodiâ nostrâ fuit, Diem clausit extremum, ut accipimus; tibi præcipimus, quod per sacramentum 12. inquiras, quæ terræ & tenementa per mortem prædicti H. & ratione minoris ætatis prædicti J. ad manus nostras Devenerunt, &c.* so that this writ is not general, but does restrain only the lands and tenements, *Quæ devenerunt, &c.* and all the other points of the said writ do relate to the lands and tenements, *Quæ devenerunt, &c.* by which it appears, that the first inquisition is not so conclusive, but that by the exprefs rules of the writ, the jurors are at large to find the truth of the tenure, notwithstanding the first office. And so it was resolved and decreed accordingly *nono Jacobi*, in the Court of Wards, in the case of one Lewes.

Award of CAPIAS UTLAGATUM by Justices of the Peace.

Capias utlagat
See 2 Hawk.
ch. 27.
Sect. 115, 116,
&c.

IN the same term, the opinion of all the Court of Common Pleas was, that if one be outlawed before the Justices of Assise or Justices of Peace, upon an indictment of felony, that they may award a *Capius utlagatum*; and so was the opinion of Periam Ch. Baron, and all the Court of the Exchequer as to the Justices of Peace, for they that have power to award process of outlawry, have also power to award a *Capius utlagatum*, as incident to their authority and jurisdiction: see the statute of the 34 Hen. 8. cap. 14. for certificate of a short transcript of every attainder, conviction or outlawry of felony, by the Clerks of the Assises, Clerks of the Peace, &c. into the King's Bench, on penalty of 40 s. &c. And note well, that such transcript is by the said act made to be of as great force as the record itself: see Lambert in his Justice of Peace, fol. 563. *contra*, but see
1 Ed,

Part XII. HERSEY's Case.

1 Ed. 6. cap. 1. Justices of Peace in case of profanation of the sacrament shall award a *Capias utlagatum* throughout all England.

HERSEY's Case.

Star-Chamber.

JOHN HERSEY, Gent. exhibited his bill in the Star-chamber, against Antho. Barker, Knt. Thomas Barker, Counsellor of Law, Robert Wright, Doctor of Divinity, Ravenscroft, Clerk, and John Haynes; and did thereby charge the defendants with the forging of the will of one Margery Pain; and the cause came to hearing, *ad requisitionem defendantium*, and upon hearing of the plaintiff's counsel, there appeared no purpose or presumption against the defendants, or any of them, but that the testament was duly proved in the ecclesiastical court, and upon an appeal was also affirmed before Commissioners Delegates, and had also been decreed in the Chancery; so that it appeared to the court, that the said bill was preferred of mere malice and spite, to slander the defendants without any colour, and because the defendants had no remedy at the common law for the said slander; and if such slander should pass unpunished, * it may encourage malicious men to make this court as a pasquil, to fix therein a libel of record to charge those that are innocent with heinous crimes, to remain to all perpetuity.

Damages on a
scandalous bill.
Vid. ant. 35.

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In this cause it was resolved by the court, that by the course of the court, and according to former precedents, the court may give damages to the defendants, and so was it done, viz. two hundred pounds to the Doctor of Divinity, two hundred marks to the Knight, forty pounds to the Clerk, a hundred and twenty pounds to the woman; and it was said, that *creare ex nihilo, quando est bonum, est divinum; sed creare aliquid ex nihilo, quando est malum, est diabolicum; & plus maledicite nocent, quam benedicite docent.*

THOM

THOMLINSON's Case.

Hil. 2 Jacobi 1.

Admiralty no Court of Record.

Hab. Corpus.
Ant. 19, 27, 45,
47, 69, 82,
Post. 129.

THEODORE THOMLINSON had brought an action of account for goods against one Philips in the Common Pleas, and thereupon Philips sued Thomlinson in the court of the Admiralty, supposing the goods to have been received in foreign parts beyond the seas; and the said Thomlinson being committed for refusing to answer upon his oath to some interrogatories there proposed to him, brought his *Habeas Corpus*, which was returned thus, *Ego William Pope Marefcallus supremæ Curie Admiralitatis Angliæ domi Justic. Sereniss. Reginae nostræ in brevi huic schedulæ annexæ specificat certific quod infra vocat' Theodore Thomlinson ante advent' istius brevis capt' fuit & custodiæ meæ commiss' ex eo quod dictus Theodorus Thomlinson vinculo sacramenti coram Judice Admiralitatis Angliæ astrictus ad respondend' quibusdam articulis contra eum in dictâ cur' dat' &c. sub pœna quinque librarum, &c. contumaciter examen suum subire recusavit, Ideirco, &c.* And it was resolved by the Court of Common Pleas.

1. That the Court of Admiralty hath no cognizance of things done beyond sea, and this appears plainly by the statute of 13 Rich. 2. cap. 5. the words of which statute are, that the Admirals and their deputies shall not meddle from henceforth of any thing done within the realm, but only of a thing done upon the sea. *Vide* 19 H. 6 f. 7. For things transitory done beyond the seas, either are triable in the King's courts, or the party grieved may have his remedy before the Justices where the fact was done beyond seas.

2. That the proceedings in the court of the Admiralty are according to the course of the civil law, and therefore the court is not of record, and by consequence cannot assess any fine in such case as Judges of a court of record may do.

3. That

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3. That the return above mentioned was insufficient, as being too general, because it is not specified for what cause or matter Thomlinson was examined, so as it might appear that the interrogatories were of such things, as were within their jurisdiction, and that the party ought by law to answer upon his oath; for otherwise he might very well refuse.

This case was intended to have been inserted by my Nota, Lord Coke into his Seventh Report, but not then published, because the King commanded that it should not be printed; but the Judges resolved *ut supra*.

* C O R V E N's Case. Page [105]

Right to Seats in the Church.

J. C. 3. Inst. 202. Mo. 870. G. 26. 199.

CORVEN did libel against Pym, an attorney in this court, for a seat in a church in the county of Devon: and Pym by Serjeant Hutton, moved the court to have a prohibition upon this reason, that himself is seised of a house in the said parish, and that he, and all those whose estate he hath in the house, have had a seat in an isle of the church: and it was resolved by the court, that if a lord of the manor, or other person, who hath an house and land in the parish, time out of mind, and had a seat in an isle of the same church, so that the isle is sole and proper to his family, and they have maintained it at their own charges, that if the Bishop would dispossess him, he shall have a prohibition, for it shall be intended that the party's ancestors, or those whose estate he hath, have erected and built the isle with the assent of the Parson, Patron, and Ordinary, to the intent to have it only to himself. But for a seat in the body of the church, if a question ariseth concerning it, it is to be decided by the Ordinary, because the freehold is to the Parson, and the place is dedicated and consecrated to the service of God, and is common to all the inhabitants; and therefore it belongs to the Bishop to order it in such manner as the service of God may be best celebrated, and that there be no contention in the church. And it is to be presumed, that the Ordinary,

Seats in churches.
See Warton's Clergyman, 382, to 388, and 643, 644.
Gibson's Cod. 221, 223.

Right to Seats in the Church. Part XII.

Ordinary, who hath the cure of souls, will take order in such cases, according to right and conveniency; that is to say, to take care that the gentlemen may have places fit for them, and the poor people fit places for them also; and the ordering thereof is a matter merely spiritual; and with this agrees 8 H. 7. 12. and the Chief Justice cited the case of Dame Wiche in 9 H. 4. 14. and said, the case there was, that the lady brought a bill in the King's Bench against a Parson, *quare unum tuniceam vocatam* a coat-armor and pennons with the arms of the said Sir Hugh Wiche her husband, and a sword in a chapel where he was buried.

And the Parson claimed them as oblations, and therefore that they did belong to him; and there it is holden, that if one use to sit in the chancel, and hath there a place, his carpet, livery, and cushion, the Parson cannot claim them as oblations, neither ought he to have the said things, for that they were hanged there in honour of the deceased; and therefore, by the same reason, although a grave-stone, coat of armour, tomb, &c. are annexed to the freehold of the Parson, yet in regard the church is free to all the inhabitants for burying, the Parson cannot take them.

And the Chief Justice said, that the lady might have a good action during her life in the case aforesaid, because she herself caused the said things to be set up there, and after her death, the heir to the deceased shall also have his action, because that (as the book says) they were hanged there for the honour of his ancestor, and therefore they are in the nature of heir-lomes, which by the common law belong to the heir, as being the principal of the family: the like law of a grave-stone, tomb, and the like.

And this agrees with the laws of other nations, *Bartho. Cassaneus, fol. 13. Concl. 29. Action. dat. si aliquis arma, in aliquo loco posita, deleat sive abrasit, &c. et in 21 Ed. 3. 48.* in the Bishop of Carlisle's case, it appeared, * that the ornaments of the chapel of a preceding Bishop do belong to the succeeding Bishop, and are merely in succession, although that other chattels, in case of a sole corporation, do belong to the executors of the deceased party, and shall not go in succession; so in the other case, things erected in the church for the honour of the dead person, shall go to his heir, as heir-lomes, as in manner of an inheritance.

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Nota:

Hussey and
Leighton.

Note, that in Easter term, 10 *Jacobi*, it was resolved in the court of Star-chamber, in the case between Hussey and Katharine Leyton, and others, that if a man have a house in any parish, and time out of mind he and all those whose estate he hath, have used to have a certain pew in the

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the church, that if the Ordinary will displace him, he shall have a prohibition ; for if he hath it by prescription, he has as good right in the seat, as he hath in his house ; but observe that he must claim it as belonging to his house, and not in other manner ; for properly it belongs to the inhabitants in the manor-house, if any manor be, and not to the manor which includes other tenants, farmers, and inhabitants : but true it is, that the Ordinary shall dispose of common and vulgar seats in the church, where there is no such prescription, as is aforesaid.

Earl of SHREWSBURY's Case.

*J. C. A. Inst. 35 A. being
also same report.*

BY force of certain letters (bearing date 28 Martii 1612.) of the Lords of the Privy Council, directed to Sir Humphrey Winch, Sir James Lay, Sir Anthony Saintleger, and Sir James Hulleston ; they did certify to their lordships the claim of Gilbert Earl of Shrewsbury, to the dignities of the earldom of Waterford, and Barony of Dungarvan in Ireland, in such manner as followeth ;

Ireland. Dignities.
Ant. 70, 81, 95.
Post. 108, 11.
7 C. 33, 34.

King Henry the sixth, by his letters patent, in the twentieth year of his reign, did grant to his thrice beloved cousin John Earl of Shrewsbury, in consideration of his approved and loyal services, in the city and county of Waterford, *pro eo quoque eundem consanguineum nostrum prædicta terra nostra Hiberniæ in partibus illis contra inimicorum & rebellium nostrorum insultus potentius defendat, ipsum in comitem Waterford, una cum stilo et titulo ac nomine & honore eidem debitis ordinamus & creamus, habendum* to the said Earl and his heirs males of his body ; and further by the said letters patent did grant the castles, lordships, honours, lands, and manors of Dungarvan to the said Earl and the heirs males of his body, to hold the premises of the King and his heirs, by homage and fealty, and by the service of being his Majesty's Seneschall in the realm of Ireland : afterwards in the Parliament called *des absentes*, holden at Dublin in Ireland, the 10th of May the 28th of Henry the eighth, by reason of the long absence of George Earl of Shrewsbury
out

out of his realm; it was enacted, that the King, his heirs, and assigns, shall have and enjoy in the right of his crown of England, all honours, manors, castles, lordships, franchises, hundreds, liberties, count-palatines, jurisdictions, annuities, fees of knights, lands, tenements; &c. and all and singular possessions, hereditaments, and all other profits, as well spiritual as temporal whatsoever, which the said George Earl of Shrewsbury and Waterford, or any other person or persons had to his use, &c. King Henry the eighth, by his letters patent, the twenty ninth year of his reign, reciting the said statute *De absentees*, * *nos præmissa considerantes, & nolentes statum, honorem, et dignitatem prædicti Comitis diminueret, sed amplius augere, de certâ scientiâ et mero motu, &c.* did grant to the said Earl and his heirs, the abbey of Rufford, with the land thereto belonging in the county of Nottingham, and the lordship of Rotherham in the county of York, the abbies of Chesterfield, Shirbrook, and Glossadel in the county of Derby, with divers other lands and tenements of great value, to be holden *in capite*; and the questions were;

1. Whether by the long absence of the Earl of Shrewsbury out of Ireland, by reason whereof the King and his subjects wanted their defence and assistance there, the title of the honour be lost or forfeited, the said Earl being a Peer of both realms, and residing here in England.

2. Whether by the said act *De absentees*, anno 28 H. 8. the title of the dignity of the Earl of Waterford, be taken from the said Earl, as well as the manors, lands, tenements, and other hereditaments in the said act specified.

And afterwards by other letters patent of the Lords of the Council, dated the 27th of September, 1612, the two Chief Justices and the Chief Baron were required to consider of the case which was inclosed within their letters, and were to certify their opinions of the same.

Which case was argued by counsel learned in the law, in behalf of the said Earl, before the said Chief Justices and Chief Baron, upon which they have taken great consideration and advisement, after they had read the preamble, and all the said act of the 28 H. 8. it was unanimously resolved by them all, as followeth.

As to the first it was resolved, that forasmuch as it does not appear what defence was requisite, and that the
con-

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consideration executory was not found by office to be broken as to that point, the said Earl of Shrewsbury notwithstanding does remain Earl of Waterford.

As to the second, it was resolved, that the said act of the twenty-eighth of H. 8. *De absentees*, doth not only take away the possessions which were given to him at the time of his creation, but also the dignity itself, for although one may have a dignity without any possession *ad sustinendum nomen & onus*, yet it is very inconvenient that a dignity should be cloathed with poverty: and in cases of writs, and such other legal proceedings, he is accounted in law a nobleman, and so ought to be called, in respect of his dignity; but yet if he want possessions to maintain his estate, he cannot press the King in justice to grant him a writ to call him to the Parliament; and so it was resolved in the case of the Lord Ogle, in the reign of Edward the sixth, as the Baron of Burleigh, Lord Treasurer of England, at the Parliament *anno* 35 Eliz. did report: and therefore the act of the 28 H. 8. (as all other acts ought to be) shall be expounded to take away all inconvenience, and therefore by the general words of the act, viz. "of honours and hereditaments, the dignity itself, with the "lands given for maintenance of it, are given to the King, "and the dignity is extinct in the crown:" and the cause of degradation of George Nevill, Duke of Bedford, is worthy the observation, which was done by force of an act of Parliament, 16 June 17 Ed. 4. which act reciting the making of the said George Duke, doth express the cause of his degradation in these words: "and forasmuch as it is openly "known, that the said George hath not, or by inheritance "may have any livelihood to support the same name, estate, "and dignity, or any name of estate;" and oftentimes it is to be seen, that when any lord is called to high estate, and hath not convenient livelihood to support the same dignity, it induceth great poverty and indigence, and causeth * oftentimes great extortion, imbracery and maintenance to be had, to the great trouble of all such countries where such estate shall happen to be: wherefore the King by advice of his Lords spiritual and temporal, and by the Commons in this present Parliament assembled, and by the authority of the same, ordaineth, establisheth, and enacteth, that from henceforth the same creation and making of the said Duke, and all the names of dignity given to the said George, or to John Nevill, his father, be from henceforth void and of none effect, &c. In which act, these things are to be observed.

Lord Ogle's case.

Honour taken
away for po-
verty.

See 4. Inst.
355.

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1. That

Earl of SHREWSBURY's Case. Part XII.

See 1 Parliament
Cases 2, 3, 4, &c.
Ant. 70, 81, 96.
Post. 112.

1. That although the Duke had not any possessions to support his dignity, yet his dignity cannot be taken away from him without an act of Parliament.

2. The inconveniences do appear where a great state and dignity is, and no livelihood to maintain it.

3. It is good reason to take away such dignity by act of Parliament; and therefore the said act of the 28 H. 8. shall be expounded according to the general words of the writ, to take away such inconvenience: and although the said Earl of Shrewsbury be not only of great honour and virtue, but also of great possessions in England, yet it was not the intention of the act to continue him Earl in Ireland, when as his possessions in Ireland were taken away from him, but that the King at his pleasure might confer as well the dignity as the possessions to any other, for the defence of the said realm. And the said letters patent *de anno* 29 H. 8. have no words to restore the dignity which the act of Parliament hath taken away; but it was not the intent of the King *diminuere statum, honorem, & dignitatem ipsius Comitis*, but *augere* his possessions for maintenance of his dignity, for so much appears by this word *augere*; for he doth by the said letters patent, with exceeding great bounty, increase the revenues of the said Earl in England, which the King did think was an increase of large possessions in England, instead of all that which was taken away from him by the act of the 28 H. 8.

And whereas it was objected, that the general words *honours* and *hereditaments* are explained and qualified by the said words relative subsequent, "which the said George, or any to his use hath;" and therefore it shall not be intended of any honour or hereditament, but of such whereof others are seised to his use, and no man can be seised of the dignity, and therefore that the said act doth not extend to it; but that it is to be understood *reddendo singula singulis*, and these words, "which the said George Earl hath, are sufficient to pass the dignity; and with this agrees the opinion of all the Judges of England in Nevil's case upon the like words in the statute of the 28 H. 8. in the Seventh Part of my Reports, fol. 33 & 34.

* Jurisdiction

* Jurisdiction of the Court of Page [109] COMMON PLEAS.

Hil. 2 Jac.

IN the last term, by commandment of the King, the Justices of the King's Bench, and the Barons of the Exchequer, were assembled before the Lord Chancellor Elsmere at York-house, to deliver their opinions, whether there was any authority in our books, that the Justices of the Common Bench may upon information to the court (which commonly is called suggestion) grant prohibitions, or whether of necessity every plea ought to be pending in the court for such cause, and the King would know their opinions in this case; and the Judges took time to deliver their opinions until this term. And then Fleming Chief Justice, Tanfield Chief Baron, Snigg, Altham, Crook, Bromley, and Doderidge, (Yelverton and Williams Justices being dead since the last term) did deliver their opinions to the said Lord Chancellor. That the precedents of each court are sufficient warrants for their proceedings in the same court; and therefore as well in the King's Bench in the Exchequer, as in the Common Bench, the judicial precedents in them are good warrants of their proceedings; and therefore for a long time, and in many successions of reverend judges, prohibitions upon information, without any other plea pending, have been granted, issues tried, verdicts and judgments given upon demurrer; all which being in force, they were unanimously agreed to give no opinion against the jurisdiction of the court of the Common Bench in this case, and none of the Judges of the Common Bench were called, or present at any conference concerning this matter; and yet *laqueus confractus est et nos liberati sumus. Et magna est veritas & praevallet.* See my particular treatise of the Jurisdiction of the Common Bench in this point, by which the jurisdiction of the court evidently appears.

Prohibitions.
13 Co. 8, &c.
41, & 70.
4 Inst. 100.
Vide Far. 8, 31,
78, &c. 113,
137, 148.

4 Inst. 99, 100;

PARLIAMENT in IRELAND.

*Hil. 10 Jacobi 1.
J.C. at length 4. Inst. 354.*

Ireland. Parlia-
ment cases, 78,
79, &c.
Far. 103.
4 Inst. 351.

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THE Lords of the Council did write to the two Chief Justices and Chief Barons in these words, “ after our hearty commendations to your lordships: whereas his Majesty, for divers weighty considerations, hath resolved to hold a Parliament within the realm of Ireland: and that by an act made in the 10th year of H. 7. called Poyning’s act, is is provided, that all such bills as shall be offered to the Parliament there, shall be first transcribed hither under the great seal of that kingdom, and having received allowance and approbation here, shall be put under the great seal of this kingdom, and so returned thither to be preferred to the Parliament, forasmuch as there are accordingly transferred hither from thence * divers bills, as well public as private, some of which bills were first agreed on here, some others were framed and conceived there, and coming now hither may happily receive amendment and alteration; we have thought meet for avoidance of any question or inconvenience that may arise of the manner and form of proceedings in amending or altering of those bills, hereby to pray and require you, calling to you his Majesty’s Attorney and Solicitor, to look into Poyning’s act, and to consider of such course as shall be fit to be held concerning the same,” &c. *dat’ ultimo Junii 1612.* Upon which in this term the said Chief Justices, Chief Baron, Attorney, and Solicitor-general, were assembled two several days at Serjeant’s Inn; and they had not only considered of the 10 H. 7. c. 4. called Poyning’s act; but also of an act made in the realm of Ireland, 3 & 4 Phil. & Ma. cap. 4. intituled, “ an act declaring how Poyning’s act shall be expounded and taken:” for by the said act of the 10 H. 7. it is provided, that no Parliament be hereafter holden in the said land of Ireland, but at such seasons as the King’s Lieutenant and Council there first do certify the King, under the great seal of that land, the causes and considerations, and all such acts as to them seemeth should pass

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pass in the said Parliament: and such causes, considerations, and acts affirmed by the King and his Council, to be good and expedient for the land, and his licence thereupon, as well in affirmation of the said causes and acts, as to summon the said Parliament under the great seal of England had and obtained: that done, a Parliament to be had and holden after the form and effect before rehearsed: and if any Parliament be holden in that land hereafter, contrary to the form and provision aforesaid, it be deemed void and of none effect in the law. Upon which act divers doubts and ambiguities were conceived, some whereof were of greater difficulty than others: and first, a doubt was conceived, whether the said act of the 10 H. 7. does extend to the successors of H. 7. for that the act speaks only of the King generally, and not of his successors. 2. If the Queen Mary were within the word King; and although these were not matters of great ambiguity, for that this word *King*, which imports his politic capacity, which never dies, and being spoke indefinitely, does extend in law to all his successors, yet is this so expounded by the said act of 3 & 4 Phil. & Ma. viz. that the said act of the 10 H. 7. shall extend to the King's and Queen's Majesty, her heirs and successors. Secondly, where the act of Poynings says, "the King's Lieutenant and Council there," a scruple did arise; that if the King appoint one by the name of his Deputy, or Lord Justice, or that if he constitute two Lords Justices, Chief Governor or Governors, and the Council, &c. and therefore it is explained in the act of the 2 & 3 Ph. & Ma. that the said act of Poynings extends to all of them. Thirdly, the greatest and most difficult doubts were upon these words of the act of Poynings: "and such causes, considerations, and acts affirmed by the King and his Council to be good and expedient for that land," &c. Whether the King may make any change or alteration of the causes, considerations or acts which shall be transmitted hither from the Lieutenant and Council of Ireland, for that it is not affirmative, but for correction and alteration of them; and therefore it was necessary to explain, that the act of the 3 & 4 Phil. & Ma. was in these words: "either for the passing of the said acts, and in such form and tenor as they should be sent into England, or else for the change or alteration of them, or any part of the same." Fourthly, another question was upon the words of the first act, viz. "that done, a Parliament to be had and holden," &c. If at the same Parliament other acts, which have been affirmed or altered here, may be enacted by the authority of the Parliament

The word *King*
extends to his
successors.
The word *King*
extends to the
word *Queen*.

1 Hale's H.P.C.
707.

* there, the which is explained by the said last act in these words, viz. "for passing and agreeing upon such acts, and "no others, as shall be so returned under the great seal of "England." Fifthly, great doubt did arise on these words, "that done, a Parliament to be holden," whether the Lieutenant and Council of Ireland, after the Parliament begun, and *pendente Parlamento*, may, upon debate and conference had there, transmit any other considerations, causes, tenors, provisions, and ordinances, as shall seem to them to be good, to be enacted at the said Parliament within the realm of Ireland, the which is explained by the said 3 & 4 Ph. & Ma. by express words that they may.

Note, reader, the order of proceedings and summons of Parliament in Ireland; first, the Lieutenant and Council do certify under the great seal of Ireland the causes and considerations of all such acts as seem good to them to be passed in Parliament, so that originally it is to begin there. 2. They are to be affirmed, altered, or changed, and returned under the great seal. 3. Licence under the great seal to summon and hold a Parliament. 4. To be done *pendente Parlamento*, as it appears it ought to be.

And it was unanimously resolved, that the causes, considerations, and acts transmitted hither under the great seal of Ireland, ought to be kept and preserved here in the Chancery of England, and shall not be remanded. 2. If they be affirmed, they ought to be transcribed under the great seal and returned into Ireland, and all that which passes the great seal ought to be inrolled here in the Chancery. 3. If the acts transmitted hither be in any part altered or changed here, the act so altered and changed ought forthwith to be returned under the great seal of England; but the transcript under the great seal of Ireland, which remains in the Chancery here, shall not be amended, but the amendment shall be under the great seal of England as aforesaid, returned into Ireland, without any signification or certification of their allowance by those in Ireland; for as the acts move originally in Ireland, so the amendments or alterations move here in England; all the bills which are transmitted here from Ireland, are with the petition of the Deputy and Council of the King all together under the great seal of Ireland, and so all the acts which are affirmed or altered, are returned together under the great seal of England. See 10 H. 6. 8. which begins Mich. 18. H. 6. rot. 46. *coram Rege*, how the Parliament in Ireland was

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was holden there before Poynings act. And see another act made at the Parliament in Ireland in the same year of 10 H. 7. c. 22. it is enacted, that all statutes late made within this realm of England, concerning or belonging to the common and public weal of the same, from henceforth to be deemed good and effective in the law, and over that be accepted, used, and executed within this land of Ireland in all points, at all times requisite, according to the tenor and effect of the same: and over that by the authority aforesaid, that they and every of them be authorised, proved, and confirmed within the said realm of Ireland; and if any statute or statutes have been made within this said land theretofore to the contrary, that they and every of them by the authority aforesaid, be annulled and revoked, void and of none effect in the law. And observe that this word (*late*) in this act, hath the same sense as (*before*) so that this act extends to all acts of Parliament made in England before this act of tenth Henry seventh, and that is the reason that all acts of Parliament made in England before this concerning Ireland, but only general acts made since the said act of 10 Hen. 7. do not bind them, because that (as it hath been said) they have a Parliament for the realm of Ireland, and those of Ireland do not come to our Parliament. *Vide R. 3. 12. Hibernia habet Parliamenta, et faciunt leges, & nostra statuta non ligant eos, quia non mittunt milites ad Parliamentum, sed personæ eorum sunt subiecti Regis, sicut inhabitantes Galinæ, Gascogniæ, & Guienæ.*

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Note.

* But question is made of this in some of our books. *Vide* 20 H. 6. 8. 32 H. 6. 25. 1 H. 7. 3. 8 H. 7. 10. 8 Rich. 2. Process 204. 10 Ed. 5. 41. 13 Ed. 2. *titulo* Bastard. 11 H. 4. 7. 7 E. 4. 27. Plowd. Comm. 368. 13 El. Dyer 35. 2 Eliz. Dyer 366. Calvin's case in the Seventh Part of my Reports 226. 14 Ed. 3. 184. A Prebend in England is made Bishop of Dublin, in Ireland, his prebendary is void.

Note.

Where a statute in England is of force in Ireland.
4 Inst. 350, 351, 356.

See the statute of Ireland, upon what books and acts of Parliament: this question is now by common experience and opinion without any scruple resolved, that the acts of Parliament made in England since the act of the 10 H. 7. do not bind them in Ireland; but all acts made in England before the 10 H. 7. by the said act made in Ireland *anno* 10 H. 7. cap. 22. do bind them in Ireland.

The K I N G's Prerogative in Dignities. *Quære.*

Dignity, prerogative.
Vide antea 70,
81, 96, 108.

NOTE, that Camden, King at Arms told me, that some held, that if a Baron dies, having issue divers daughters, the King may confer the dignity on him who marries any of them, as hath been done in divers cases, viz. In the case of the Lord Cromwell, who had issue divers daughters, and the King did confer the dignity upon Burchier who married the youngest daughter, and he was called Lord Cromwell: and so in other cases: and he said, that the Earl of Gloucester, who had married the daughter of King Henry the third, and the Countess after married Mount Hermer, who was her husband's Secretary, for which the King imprisoned him; and after being restored to the King's favour, during the minority of the son of the said Earl of Gloucester, and until the infant came of full age, and when the infant was of full age he was called to the Parliament by the name of the Earl of Gloucester, and the other by the name of Mount Hermer-Knight; and he said, that it appears in the edict, or statute made in France, that if any be made Duke, Marquis, Earl, or Baron of any privileged place, as of Guise, &c. if he die without heir male of his body, the dignity is not only extinct, but the K. shall have the manor or territory whereof he took his name and dignity: *sed nos non habemus talem consuetudinem.*

Ecclesiastical Jurisdiction.

See Gibson's
Codex 531, 532.

NOTE, (by Linwood) that it appears, that by the canons ecclesiastical, none may exercise ecclesiastical jurisdiction, unless he be within the orders of the church, because none may pronounce excommunication, but a spiritual person; and there it appears, that as well the Register as the Judge ought to be spiritual, but now by the statute of the 37 H. 8. cap. 17. A Doctor of Law or Register, although he be a layman, may execute ecclesiastical jurisdiction.

Note

Part XII. Custom of LONDON.

Note, also, that by the canons no ecclesiastical Judge ought to cite any Churchwarden to the court, but so as he may return home again to his house the same day.

Also the canons do limit how many courts *ex officio* they may have within a year.

* Custom of LONDON. Page [113]

Mich. 11 Jac.

NOTE, that if a man gives to one of his children a certain sum in his life, and after dies, although this is not given as a child's full portion, yet it shall be sufficient for him; but if the father by writing or by will does declare, that it is but part of a child's portion, then he shall have a full child's part, otherwise not. But some made a difference where this sum, so given and declared to be but for part, shall be accounted upon account parcel of the entire estate or not; that is to say, if the issue so in part advanced shall have so much as amounts to a child's part, and that the wife and the executor shall gain thereby, where that this portion so given, shall be of no benefit to the wife or the executors.

See 2 Salk. 426.
1 Lev. 227.
1 Lev. 130.
2 Show. 249.

As if a man hath two children, and gives to one of them an hundred pounds in part of his advancement, and then dies worth 900l. in this case the wife, the issue not advanced, and the executors shall have but three equal parts of the 900l. viz. three hundred pounds a-piece; and then this hundred pounds so given shall be in hotch-pot between the children; which (as I think) cannot be; for then there shall not be equality among the issues, as the custom doth require, who ought in my opinion to have the precedence of favour, if any be.

D E V I S E.

NOTE, it was holden by the Judges in the King's Bench, that if a man, being possessed of a house and term for years, doth devise to pious uses for years, and then does demise this to his wife for life, the remainder over, and dies, all his debts being paid; if the widow enters generally, and converts the profits to her own use, and not to pious works; this is a determination of her election: and this is the general case, and therefore it is good that it be specially found.

H A Y N E S's Case.

Felony to steal a
winding sheet.
9 E. 4. 14.
Moor 878.
3 Inst. 110, 202.
Who hath pro-
priety in them.

NOTE, in the Lenten assise, held at Leicester 11 and 12 *Jac.* the case was, that one William Haynes had digged up the several graves of three men and one woman in the night, and had taking their winding sheets from their bodies, and buried them again; and it was resolved by the Justices at Serjeants Inn Fleet-street, that the propriety of the sheets remain in the owners, that is, in him who had property therein, when the dead body was wrapped therewith, for the dead body is not capable of it, as in 11 H. 4. If apparel be put upon a boy, this is a gift in the law, for the boy hath capacity to take it; but a dead body being but a lump of earth hath no capacity; also it is no gift to the person, but bestowed on the body for the reverence towards it, to express the hope of resurrection. Also a man cannot relinquish the property he hath to his goods, unless they be vested in another; and accordingly at the said assises, he was severally indicted for taking each of these sheets: and the first indictment was of petty larceny, for which he was whipped: and at the same assises he was also indicted for the felonious taking the three other sheets, for which he had his clergy, and so escaped the sentence of death, which he well deserved, for this inhuman and barbarous felony.

* Earl of D E R B Y's Case. Page [114]

In Cancellariâ.

Hil. 11 Jac.

I N the Chancery, between Sir John Egerton, plaintiff, and William Earl of Derby, Chamberlain of Chester, and others, defendants, for the trust and interest of a farm called Budshaw in the county of Chester: it was resolved by the Lord Chancellor, the Chief Justice of England, the Master of the Rolls, Doderidge and Winch Justices. County palatine.
N. Chan. cases
451.

1. That the Chamberlain of Chester, being sole judge of equity, cannot decree any thing wherein himself is party, for he cannot be a judge *in propria causâ*, but in such case where he is party, the suit shall be heard here in the Chancery, *coram domino Rege*.

2. If the defendants dwell out of the county palatine, he who hath cause to complain in equity, may also complain here in the Chancery, for in respect that proceedings in Chancery do bind the person only, if the person be out of the jurisdiction, the Chamberlain of Chester cannot relieve the party; and therefore, *ne curia domini Regis deficeret in justitiâ exhibendâ*, the suit shall be here in the Chancery; for else the subject shall have good right, and yet have no remedy, which will be inconvenient. Cumberb. 30, 49.

And this does pursue the reason of the common law, as appears 13 Ed. 3. tit. Jurisdiction. 8 Ed. 2. Aff. 382. 5 Ed. 3. 30. 30 H. 6. 6. 7 H. 6. 37. The case of the Lord of the Marches of Wales, although an action will lie in Wales, yet because he which hath cause of action cannot have justice there, he shall sue here in the King's Bench; for where the particular courts cannot do justice to the parties, they shall sue in the King's general courts at Westminster, 11 H. 4. 27. 8 Ed. 4. 8. in all cases where it appears to the court, that those who have liberties to take consuance, do fail of right as in matter of foreign plea, &c. the matter shall be determined in the general courts at Westminster.

3. It

Forms and Orders of Parliament. Part XII.

Note.
Causes in equity
may not be de-
termined by
commission.

3. It was resolved, that the King cannot grant a commission to determine any matter of equity, but it ought to be determined in the court of Chancery, which hath had jurisdiction in such case time out of mind, and always such allowance by the law: but such commissions or new courts of equity shall never have such allowance, but have been resolved to be against law, as it was agreed in Pott's case.

4. Upon consideration had of the certificate of the Lord Dyer, and other Justices in the time of Queen Elizabeth, concerning the jurisdiction of the county palatine of Chester; it was resolved, that for things transitory, although that in truth they be within the county palatine, the plaintiff may by law allege them to be done in any place within England, and the defendant may not plead to the jurisdiction of the court, that they were done within the county palatine. See Dyer 13 Eliz. fol. 202. 716. Office found by mandate out of Chancery of land in Cheshire is void.

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* Forms and Orders of Parliament.

Proceedings in
Parliament.
4 Inst. 6, 7, 8.

IN the House of Commons, when the Speaker is chosen, he in his place, where he first shall sit down, shall disable himself, and shall pray that they would proceed to a new election; but after he is put into the chair, then he shall pray them, that with their favours he may disable himself to the King, so that their expectations may not be deceived.

4 Inst. 7.

But note, that the King the first day of Parliament shall sit in the upper house of Parliament, and there the King or the Lord Chancellor by his commandment, shall relate and shew the causes of calling the Parliament, the which are best founded on the words of the writ of summons of Parliament (which is a good subject to treat on, &c.) and then in the conclusion of the oration, the Commons are commanded to chuse a grave and learned man to be their Speaker. Upon which the Commons shall presently assemble themselves in the lower house, and he is to be a member of their Parliament, and hereupon he shall disable himself, *ut supra*.

See Bohun's
Debates in Par-
liament 353,
354.

And

Part XII. Forms and Orders of Parliament.

And two or three days after, the Commons shall present their Speaker in the upper house to the King, where he shall disabie himself again to the King, and in most humble manner shall intreat the King to command them to chuse a more sufficient man: and after he is allowed by the King, then he shall make an oration, and in the conclusion shall pray the four usual petitions; the which oration being answered by the Lord Chancellor, and his petitions allowed, the Speaker and the Commons shall depart to the House of Commons, where the Speaker in the chair shall request the Commons, that inasmuch as they have chosen him for their mouth, that they would assist him, and favourably accept his proceedings, which do proceed out of an unfeigned and sincere heart to do them service.

4 Inst. 8, 2, 10.

Note, in the lower house, when a bill is read, the Speaker does open the parts of the bill, so that each member of the house may understand the intention of each part of the bill; and the like is done by the Lord Chancellor in the upper house; then when it is read the second time, sometimes it is ingrossed without any commitment, but then the Speaker makes question of it in this manner: the question is, whether this bill shall be ingrossed or not? As many as would have the bill ingrossed, shall say, yea; and as many as would not, say, no.

Vide Rymeri
M S. de modo
expediendi billas
in Parlamento,
pene W. Bohun.

4 Inst. 35.

But in the upper house of Parliament when such question is made about engrossing, if there be no contradiction, the Lords do not deliver their assent in saying, content, or their dissent, in saying, not content, for husbanding the time; but if there be any contradiction, it is tried *seriatim*, by content, or not content; but neither in the upper or lower house, the Lord Chancellor or Speaker, shall not repeat a bill or an amendment but once.

When a bill is committed to the second reading, then if the committees amend it in any point, then they shall write down their amendments in a paper, and shall direct to a line, and between what words the amendments shall be put in, or what words shall be interlined, and then all shall be ingrossed in a bill.

And if a bill pass in the Commons house, and the Lords amend the bill when it is sent to the upper house, they do as before shew the line, and between what words, and after the amendments are ingrossed with particular * references, and the bill with the amendments are sent again to the house of Commons where they affirm them; the amendments are read three times, and then they insert them into the body of the bill, and so *e converso* of a bill which passeth first in the upper house. But note, that in

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one

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one of these cases the entire bill shall not be read again in the house wherein they first pass, but the amendments only, for no bill shall be read above three times.

No Lord ought to speak to the bill two times in one day. Also no Knight, Citizen, or Burgeſſs ought to speak above once to one bill in one day, unless sometimes by way of explication.

No private bill ought to be read before the public bills, unless the one house or the other do require it.

Note, in the House of Commons, those that are for the new bill, (if there be a question of voices) shall go out of the house, and those who are against the bill, and for the common law or any former law, shall sit in the house; for they are in possession of the old law: and in the upper house two Lords are appointed, one of the one part, the other of the other, to number the voices.

In both houses, he which first stands up to speak, he shall first speak, without any difference of persons.

When a bill is ingrossed at the third reading, it may be amended in the same house in any matter of substance, *a fortiori*, the error of the Clerk in the ingrossing may be amended, &c.

WALTER CHUTE's Case.

Pasch. 12 Jac. 1.

New erected office void.

2 Inst. 540.

3 Inst. 185.

4 Inst. 31, 40,

41, 196, 199,

200.

Q. Skinner 607.

WALTER CHUTE. Sewer to the King, did exhibit a petition to the King, that for the safety of the realm, and the security of strangers within the realm, that the King would vouchsafe to erect a new office of registering of all strangers within the realm, except merchant-strangers, to be kept at London; and to grant the said office to the petitioner, with a reasonable fee, or without a fee; and that all strangers, except merchant-strangers, might depart the realm within a certain convenient time, if they do not repair to the said register, and take a billet under the Register's hand: which petition the Lords of the Council did refer to me,

Part XII. WALTER CHUTE's Case.

me, by their honourable letters of the 13th of November, 1613. that I calling to me counsel learned in the law, should consider what the law is in that behalf, and how it may stand with conveniency and policy of state, to put the same in execution, and by whom it ought to be performed: and upon conference had with the Justices of the Common Pleas, and the other Justices and Barons of Serjeants Inn in Fleet-street, it was resolved, that the erections of such new offices, for the benefit of a private man was against all law, of what nature so ever: and therefore where one Captain Lee did make suit to the King to have a new office to make inventory of goods of those who died testate or intestate; it was resolved by the Lord Chancellor and myself, that such grant shall be utterly void, although no certain person hath it, and that this was against common law, and the statute of 21 H. 8. In like manner another sued * to have the registering of birth-days, and the time of the death of each person within the realm; and that it might be on record and authenticall: so Mich. 9 Jac. To make a new office in the upper Bench, for the only making of all latitats at the suit of the Lord Daubigny, and after him of the Lord John Hungerford, and others, was resolved to be void. So Littleton's suit, to name an officer to be a general Register, or rather tabler or indexer of all judgments, for debts, and damages, recognizances, bills, obligations to the King, deeds inrolled, fines upon offenders in the Star-chamber, and other courts whatsoever: and this was pretended to be for the benefit of the purchaser, and the ready finding of records; and to such purpose was made the statute of the 27 Eliz. for inrolling of statutes; but the suit was rejected by the two Chief Justices and others: for every court shall chuse officers either by law or prescription: the law or custom may not be changed without a Parliament; and so it was resolved *Hil. 12 Jac. Regis*; and divers other such inventions were resolved to be against law and record.

As to the second, in the case of Sir Walter Chute, concerning the conveniency or inconveniency of it, it was resolved, that it was inconvenient for divers causes. 1. For a private man to have private ends. 2. The numbering of strangers by a private man would infer a terror; and the King and Princes of other countries will take offence at it, and will do the like to the King's subjects. 3. It is to be considered, what breach it will be to former treaties.

As

As to the third, in the case of Sir Walter Chute, that may be performed without any inconvenience; and so it was devised by the Lord Burleigh, and other Lords of the Council, anno 37 Eliz. viz. to write letters to the Mayors, Bailiffs, and other head officers of every city, borough, or town where any strangers, are resident, to certify how many strangers, and of what quality are in their cities, &c. the which they are to know in respect of their inhabitants and contributions to the poor, and other charges; and this may be done without any writing.

Which suit being made to the Lords, was well approved by them, and the suit utterly disallowed the 3d December, anno 3 H. 8. commission granted to divers, to certify the number of strangers, artificers, with the number of their servants within London, and the suburbs thereof, &c. according to the statutes. See Candish's case, 29 El. for making of all writs of *Superfedeas* in the King's Bench.

13 Eliz. a grant of an office of Thomas Knivet, to examine all his Majesty's Auditors and Clerks of the Pipe concerning their offices for years: it was resolved by the court to be against law; for it belongs to the Barons who are Judges; and it is also an innovation in a court of justice, 25 Eliz. A grant of an office to Tho. Leichfield to examine all deceits, false allowances of the Queen's officers for eight years, resolved to be void.

The making of *Subpoenas* in Chancery, anciently belonged to the six Clerks: the late Queen's Majesty granted the same by patent to one particular man.

The keeping and filing of affidavits in Chancery, anciently belonged to the Register. The King's Majesty, that now is, granted the same to one particular man.

The erecting and putting down of inns hath been anciently in the power of the Justice of Peace. His Majesty's hath given that power by patent to a particular man:

* The taking of the depositions, and all other proceedings before and by the commission, which hath used to be taken and kept by the Commissioners themselves, or some Clerk of their appointment: his Majesty hath granted the same by patent to one particular man.

The King by his letters patent granted to Simon Darlington the office of Alveger, and limited what fees he should take.

The sole drawing, writing and ingrossing of all licences and pardons was granted to Edward Bacon, Gent. with the
fee.

Part XII. Sir STEPHEN PROCTER's Case.

fee that had formerly been taken, and a restraint for all others, &c.

The offices of *Subpœnas* was granted to Thomas George and others during life, with the fee of 2s. and a restraint that no others presume to make those writs.

The office of making and registering all manner of assurances and policies, &c. was by letters patent granted to Richard Gandler, Gent. with such fees as the Lord Mayor and others should rate, with power to rate fees, and a restraint of all others, &c. which was during pleasure, and afterwards to him and others during lives.

The office of writing tallies and counter-tallies granted to Sir Vincent Skinner.

The office of ingrossing patents to the great seal, and an increase of fees granted lately to Sir Richard Young, and Mr. Pye. *Quære.*

[Q. Skinner 607.]

Sir STEPHEN PROCTER's Case.

IN an information preferred in the Star-chamber by the Attorney-general, against Sir Stephen Proctor, Berkenhead, and others, for scandal and conspiracy of the Earl of Northampton, and the Lord Wooton. At the hearing of this case, were present eight lords, *scil.* the Chief Baron, the two Chief Justices, two Bishops, one Baron, the Chancellor of the Exchequer, and the Lord Chancellor: and the three Chief Justices, and the temporal Barons condemned Sir Stephen Procter, and fined and imprisoned him: but the Lord Chancellor, the two Bishops, and the Chancellor of the Exchequer acquitted him. And the question was, if Sir Stephen Procter shall be condemned or acquitted; and it seemed to some of the Clerks *prima facie*, that the better shall be taken for the King, and that he shall be condemned. But others were of the contrary opinion; and hereupon the matter was referred to the two Chief Justices, calling to their assistance the King's learned Counsel: and first they resolved, that this question must be determined by the precedents of the court of Star-chamber; for that court is against the rule and order of all other courts, for in the King's Bench, Judges divided in the Star-chamber.
the

Sir STEPHEN PROCTER'S Case. Part XII.

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the Common Pleas, or the Exchequer, or in the Exchequer-chamber, where all the Justices are assembled, if the Justices are equally divided, no judgment can be given; and so it is in the court of Parliament; and therefore this course ought to be warranted by the custom of the court; and as to that, two precedents only were produced for the maintenance of the said custom, viz. one in the Hilary term, 39 El. between Gibson plaintiff, and Griffith and others defendants; where the complaint was for a riot, and at the hearing of the case there were eight present; four gave their judgments that the defendants were guilty; but the other four, whereof the Lord Chancellor was one, pronounced * the defendants not guilty, and no sentence of condemnation was ever entered, because the Lord Chancellor was one of the four who acquitted them. The other was Hil. 45 Eliz. in an information by the Attorney general against Catharine and others, for forging of a will, and a misdemeanor for procuring a fraudulent deed to defeat the Queen of her escheat: and eight were in presence at the hearing of the cause, whereof four found the defendants guilty of forgery, and did inflict the punishment according to the statute of the 5 Eliz. but the others, whereof the Lord Chancellor was one, gave sentence, that the defendants were guilty of the misdemeanor, and not of the forgery, and imposed a fine of 500l. only: which decree was entered according to the Lord Chancellor's voice, although the sentence on the other side was more beneficial for the King; and no other precedent could be found in this case, the which I have reported this term.

Exaction of Benevolence.

*See W. Oliver St John's case in
vol. XI. of the State Trials.*

NOTE, the exaction under the good name of benevolence began in this manner.

“ When King Edward the fourth had a subsidy granted
“ to him in the 12 Ed. 4. by Parliament, because he could
“ have no more by Parliament, and without a Parliament he
“ could not have any subsidy to be levied of the lands and
“ goods of the subject, he invented this shift or device, in
“ which three things are to be observed.”

I. The

See Speed's
Chron. 529,
706, 742.
Rawley's Hist.
524, 525.
Polyd. Virgil,
302, 303, 527,
576, 1706, &c.
Petition of right,
Cotton, tit.
Loans.
Whitlock's MS.
tit. Benevolence.
13 Co. 29.

Part XII. Exaction of Benevolence.

1. The cause.
2. The invention.
3. The Success.

1. The Duke of Burgundy, who had married Margaret, the sister of Edw. 4. solicited King Edward to join in war with him against the French King, to which the King easily consented, because he sought revenge against the French King for aiding the Earl of Warwick, Queen Margaret, and Prince Edward, and their party; and therefore to make war against the French King was the cause.

Hollinhead
11 Ed. 4, 694.
Stow. 701.

2. The invention was, the King called before him at several times a great number of the wealthiest of his subjects, to declare to them his necessity, and his purpose to levy war for the honour and safety of the kingdom, and demanded of each of them a certain sum of money; and the King treated with them with such great grace and clemency, and with such gentle prayer to assist him in his necessity, for the honour of the realm, that they very freely yielded to his request, for the honour and safety of the realm: amongst the rest, there was a widow of a very good estate, of whom the King merely asked what she would willingly give him for the maintenance of his wars; by my faith, quoth she, for your lovely countenance sake, you shall have twenty pounds, which was more than the King expected; the King thanked her, and vouchsafed to kiss her, upon which she presently swore, he should have twenty pounds more.

3. The success and event was, that whereas the King called this a benevolence to please the people, yet many of the people did much grudge at it, and called it a malevolence.

Primo Ed. 5. in the oration of the Duke of Buckingham in Guildhall in London, he inveighed, amongst other things, against this taxation under the name of benevolence, 1 Rich.

3. cap. 2. the subjects of the realm shall not be charged with such charge or imposition called benevolence, which tendeth to the subversion of the law, and destruction of commonalty, as appears in the preamble (where any such charge.) And that such exaction before taken, under the name of benevolence, shall not be drawn into example * to make such or

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the like charge, but shall be damned and adnulled for ever: * but it appears by the preamble, that this benevolence was against the will and liberty of the subject, but a free-will offering is not restrained.

Anno 6 H. 7. The King declared in Parliament, that he had just cause of war against the French King, which for the causes there shewn was approved; and for that he de-

Exaction of Benevolence. Part XII.

fired a benevolence towards the maintenance of it; and every one promised his helping hand, the which the King greatly commended; and to the intent that the poorer sort might be spared, he demanded it by way of a benevolence, according to the example of Ed. 4. and published, that he would by their open hands measure their benevolent hearts, and he who gives but a little, according to his gift.

By this means he collected great sums of money, with some grudge for the extremity shewn by the Commissioners,

10.

11 H. 7. cap. 20. An act was made for levying of that benevolence, according to their assent, but only of such as assented.

Stow 330.

Anno 20 H. 7. A commission to levy what was granted by 11 H. 7.

Note, that 15 H. 8. a commission under the great seal, called a commission of anticipation, to collect the subsidy before the day.

Anno 16 H. 8. For war with France, a benevolence levied by commission with great curses and imprecations against the Council, and with success; for it was to levy a sixth part of the value in money or plate against the good will of the subject.

Anno 26 H. 8. Another benevolence levied by commission for maintenance of war against France, with ill success, for it was exacted of the subject against his good will. But if the subjects of their free will, without any compulsion, will give to the King for public uses any sums of money, this is not prohibited by any statute.

10.

And the statute 11 H. 7. cap. 18. proves this, where the Parliament compels them who have freely granted any thing to the King for public use, to pay it.

Camden's Annals, 2 part 21.

Feb. anno 40 Eliz. It was resolved by all the Justices and Barons, that a free grant to the Queen without coercion is lawful; and accordingly they granted it to the Queen, *quod nota bene, quia, &c.*

[Note also, a benevolence was taken 12 Jac. 1. and another 19 Jac. 1. and both of them after dissolutions of the Parliament. See for this Whitlock's MS. tit. Benevolence. And *quære*, if not contrary to the statute R. 3. c. 2.]

IRELAND, and Free Borough.

Pasch. 12 Jacobi. 1.

THE case of Dungannon in Ireland; the case of the new corporation of Dungannon in Ireland, was in effect, *scil.* that the King constituted the town of Dungannon to be a free borough, *et ulterius volumus, declaramus, & statuimus, quod inhabitantes villæ prædictæ sint unum corpus incorporatum per nomen Præpositi, 12 Burgensium & Communitatis Dungannon, & per idem nomen placitare possint: et quod ipsi prædicti Præpositi et Burgenses et successores sui habeant potestatem eligendi duos Burgenses &c. ad Parliamentum, &c.* And the doubt was, whether this grant of election of Burgesses of Parliament was good, for because it was granted but to parcel of the body, *scil.* to the Provost and Burgesses, and not to the Provost, Burgesses, and Commonalty. And the Chief Baron thought, that forasmuch as this was not but a nomination or election, it was sufficient to make the Provost and Burgesses only to have it: and he took a diversity betwixt nomination and other inheritance: but this was denied * by all the Justices and Barons; for this power to elect Burgesses, is an inheritance of which the Provost and Burgesses are not capable, for that it ought to be vested in the entire corporation, *scil.* Provost, Burgesses, and Commonalty: and it seemed to Hobart, Chief Justice of the Common Pleas, that the King may grant to the inhabitants of Illington to be a free borough; and that the Burgesses of the same town may elect two Burgesses to Parliament: and that it shall be good, although that the Burgesses be not incorporated; for there are many Burgesses who elect Burgesses to the Parliament, which are not incorporate: but it was resolved by all, that such a grant made by the King should be void; for the inhabitants have not capacity to take an inheritance, as in 15 Ed. 4. to have common: and Littleton saith in his chapter of Burgage, that the boroughs which send Burgesses to Parliament, were the most ancient and principal cities, &c. so that it shall be intended, that at the first they were incorporate. Also *plus valet sæpenumero vulgaris consuetudo, quam regalis concessio.*

11. Nov. 14.

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See 3 Salk. 12.

But it was resolved by Hobart, Tanfield, Altham, Winch, Nichols, and Haughton, *quod volumus*, was a good word of grant, as Piggot was of opinion, 21 Ed. 4. And this shall be an implied grant to all the corporation, that the Provost and Burgessees shall elect, &c. And regularly, when the grant is indefinite, *scil.* first, *concedimus* an uncertain thing, *et ulterius quod præpositus, et Burgessees, et successores sui elegerint*; this shall be within the first *concedimus* to all the body, which that party shall chuse: but the Chief Justice of England, and Doderidge, thought the contrary; for in this case there was but an ordinance to erect the corporation, and no grant altogether to any person, so that this clause, *et quod, &c.* is idle and vain.

And note, all the new corporations were of the same form, and in none of them is any clause to elect new Burgessees, so that when those of the modern Burgessees die, this power to elect Burgessees is gone.

FELONS GOODS.

Mich. 12 Jacobi I.

Felons goods:
when forfeited.
See 2 Hawk. c.
30. sect. 29. c.
49. sect. 10, 11,
12, 13, &c.

A Question was moved to the Chief Baron, and the Justices of Serjeants Inn in Chancery-lane, that if a felon be convicted either by verdict or confession, if immediately by his conviction, his goods and chattels be forfeited. And it was said, that if the felon after his conviction pray his clergy, that then clearly he shall forfeit his goods and chattels, for *quodammodo* this is a flight, because he refuseth to be adjudged by the common law, and flies to the privilege of the holy church. But it was resolved by the Chief Baron and the Justices, that immediately by his conviction his goods and chattels are forfeited; and the praying of his clergy is not any forfeiture; for then in case where he cannot have his clergy, he forfeits nothing until his attainder, which none will affirm. And with this agrees Stamford 192. a. where he says, that the goods of a felon are forfeited, which he hath the day of the verdict given; and this is proved also by the statute of 1 R. 3. where it is admitted, that the goods of a felon convicted are forfeited and may be seized. And of the same opinion was the Chief Justice, and the Justices of Serjeants Inn in Fleet-street. *Vide Trin. 41 Eliz. 332.*

* ANN HUNGATE's Case. Page [122]

*In Cam. Stell.**Mich. 11 Jacobi 1.*

IN this very term a great case was heard and determined in the Star-chamber, between Sir Henry Day, who died, pendent the bill, and Anne his wife, and Nicholas Bedingfield, Esq. and Eliz. his wife, plaintiffs, and Anne Hungate, widow, Sir Robert Wind, Henry Branthwaite, Esq. Thomas Townsend, Esq. Thomas Blomfield, Gent. and George Min, Gent. defendants; and the case in effect was, that Henry Hoogan, Esq. being seised of the manor of Hamonds, and of divers lands in East Bradenham, &c. in the county of Norfolk in fee, by deed made a feoffment of them to the use of the said Anne who took Hungate to husband, and she had issue by him a son and a daughter, and he died: and Anne obtained a grant of the wardship of the son, and after when the son was of the age of one and twenty years, saving six weeks; by *Dedimus potestatem*, directed to Sir Robert Wind, Henry Branthwait then feodary, and Thomas Townsend, they took cognizance of a fine of the said son, being then of the age aforesaid, and sick: and the bill charged them all with practice in procuring the said son to acknowledge the fine; they all knowing that the said son was within age, and in ward of the King in custody of the said Anne: but there was not any practice or circumvention used by any of the defendants to procure the said son to acknowledge the same, but the son of his own good will levied it. And by indenture the use was limited to his mother, the said Anne and her heirs with power of revocation by the son upon tender of ten shillings, &c. and this was in consideration, that the mother had paid the debts of his father to a very great value, and had obtained the wardship of him, and that her jointure should be confirmed; and that his mother, if she pleased, might give it to his brother which she had by Hungate, who was of half-blood; and it appeared that the mother knew the son to be within age, but the Commissioners, for any thing that was proved, were ignorant of it, nor did they send for the book of the church, in which his age appeared, being in the same parish.

Fine by an infant, good.
See for this
1 Co. 76.
3 Co. 57, 68, 77.
5 Co. 2 Part,
38, 44, 45.
8 Co. 58.
11 Co. 59, 77.
2 Salk. 567.

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And the counsel for the plaintiff prayed, that the defendants should be punished for their misdemeanor; and that the said women being plaintiffs, who were cousins, and heirs to the said son of the entire blood, who should be disinherited by the said fine. To which it was resolved by the two Chief Justices, and the Chief Baron, that there was not any crime punishable by the law in this case: for the Judges of law, and of this court, may punish such offences and crimes as are determinable in this court: but the Judges cannot create offences, nor do as Hannibal did, to make his way over the Alps, when he could find none, for *jndicandum est legibus; & ubi non est lex, nec est transgressio*: and for this, when the infant levied the fine, if it be not reversed during his minority, the fine is unavoidable in law, and the heirs of the infant have not any remedy by the law to reverse it; the cause is for this, that the age of the infant is not to be tried but by inspection of his person: *non testium testimonio, non juratorum veredicto, sed judicis inspectione solummodo*: but the Judges as by *adjuncula*, may inform themselves by witnesses, * church-books, &c. And the reason of it is, that the fine should otherwise as well lose its effect as its name, for *dicitur finis ab effectu, quia finem litibus imponit*: and if infancy should be tried otherwise than by inspection, no man should be sure of his inheritance; for after the death of the cognisor, averment may be made many years after, that the cognisor was within age at the time of the fine; and so many records avoided by naked averment, which should be against law, and the cause of great vexation and suit, and Fitz. N. B. fol. 21. If an infant levy a fine, he shall have a writ of error during his nonage, and assign it for error; and this is error of the court in law, and shall be tried by the Judges of law.

And for this it was resolved by the said Justices, that forasmuch as no corruption and circumvention was proved in the Commissioners, or in any of the parties, of which they may be indicted at the suit of the King, or punished in this court, the fine shall stand.

And it was not apparent to the Commissioners, that he was within age, forasmuch as he wanted but six weeks of his full age; but if the Commissioners had knowledge that he was within age, then this had been a misdemeanor in them: for it was said, that fines and recoveries are like to the pole arctic and antarctic, for upon those assurances of lives depend; for which by naked averment they cannot be shaken or impeached, for which divers notable precedents have been concerning the matter in question in this court.

And

Part XII. MANSFIELD's Case.

And for this in this court, Mich. 24 & 25 El. Case 14. between William Cavendish and Anne his wife, one of the co-heirs of Henry Knightly, against Robert Worsley, and Catharine Lanter co-heir, and Trafford, and other defendants. And the case was, that Robert Worsley and Catharine his wife being within age acknowledged a note of a fine before Trafford, and another of the defendants, by *Dedimus potestatem*: and the decree saith, that the Commissioners did perfectly know that the said Catharine was within age; and for this cause every one of them was fined; but the fine stands.

Mich. 38 & 39 Eliz. In this court one Alexander Gilderbrand being seised of certain lands in Windham, *in com' Norf.* in fee, one Hubbard procured one Roger, who was in his custody in his house, to take upon him the name of Alexander Gilderbrand, who was then beyond the seas, to acknowledge a fine to the said Hubbard of the said lands, and they were fined in this court; and it was part of the sentence, that if he did not re-assure the land to the said Alexander, he should forfeit a greater fine to the Queen: but there was no sentence to draw the fine off from the file, nor damages awarded to the said Alexander, who was the party grieved.

MANSFIELD's Case.

Mich. 12 Jacobi 1.

ANNO 23 Eliz. in the court of Wards, the case was this, Fine, by an ideot. that Henry Bushley seised in fee of certain lands in North Mins in the county of Hertford, by his will in writing demised the said lands to Henry Bushley his son in tail, the remainder to one William Bushley.

* And for this, that his son was within age, he demised the education of him to Thomas Harrison, whom he made his executor: and afterwards it happened that Henry the son became a monstrous and deformed cripple, and proved an *ideot a nativitate*; the which ideot by the practice of one Nichols and others, was ravished and taken out of the custody of his guardian, and was carried upon men's shoulders to a place unknown, and there kept in secret, until he had acknowledged a fine of his lands to one Botherme, before Justice Southcot, *anno 9 Reg. Eliz.* and by

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See for this

2 Co. 58.

4 Co. 2. and

124, 125.

10 Co. 42.

WARCOMBE and CARREL's Case. Part XII.

indenture betwixt them, the use of the said fine was declared to the use of the congrisee and his heirs, which Bothome, *anno* 12 Eliz. conveyed the said land to one Henry Mansfield: and *anno* 22 Eliz. the said Henry Bushley the son, by inquisition was found an *idiot a nativitate*; and upon this *in anno* 33. the court of Wards took order for the possession of the said lands. *Vide* Calvert's case in my Reports.

And it was moved as a doubt in the said court of Wards, whether the said fine should be to the use of the said idiot and his heirs; for notwithstanding that the fine which is of record binds the idiot for the causes aforesaid, yet the indentures are not sufficient to direct the uses: but it was resolved, that forasmuch as he was enabled by the fine as to the principal, he shall not be disabled to limit the uses, which are but as accessory.

And the same is the law of an infant and feme covert. And the said Mansfield brought an action of trespass in the Common Pleas against one Trott, the farmer of the said lands; and the issue was to be tried at the bar: and the said deformed idiot was sent out of the court of Wards, to be shewn to the Judges of the Common Pleas, and to the jurors there tried and sworn: and being brought upon a man's shoulders, the Judges hearing that the title of Mansfield was under the said fine levied by that idiot; the Lord Dyer, and the court by consent of parties, caused a juror to be withdrawn; and the Lord Dyer said, that the Judge who took the fine, was never worthy to take another; but notwithstanding this, and although the monstrous deformity and ideocy of Bushley was apparent and visible, yet the fine stood good.

WARCOMBE and CARREL's Case.

Mich. 12 Jacobi 1.

Fine by an infant feme covert.
Vide supra and *antea* 22.

20 OCTOBER 6 Eliz. in the Star-chamber, where were present Sir Nicholas Bacon, Knight, Keeper of the Great Seal, the Marquis of Northampton, the Earl of Westmorland, the Earl of Suffex, the Earl of Leicester, Lord Clynton, High Admiral, Lords Strange and Hunsden, Progers Knight, Comptroller of the Household, Sir Francis Knols, Secretary, Sir William Peeters, Sir John Mafon, Sir Richard Sackvil, Under-Treasurer of the Exchequer, Sir Robert Catlin,

Part XII. WARCOMBE and CARREL's Case:

Catlin, Master of the Rolls, Sir James Dyer, Justice *del Banc.* The case was, that Edward Carrell, an apprentice of the laws, for a great sum of money bought the wardship of Johan, daughter and heir of Waincombe of the county of Hereford, and married her to Edward Carrell, his youngest son: and after * *Hil. anno 5 Eliz.* the said Johan fell sick, and being of the age of nineteen years, and not having any issue, the said Edward her husband persuaded her to acknowledge a fine of her inheritance, by which should be conveyed an estate to the husband and wife in tail, the remainder to the right heirs of the wife: and cognizance was taken by *Dedimus potestatem* directed to Sir T. Sanders and one Chesnell of Gray's-Inn, before Easter, divers Judges being here who might have examined her: and on Friday in Easter week she died, but the fine and *l' argent du Roigne* was entered as of the last term, *scil.* the term of St. Hilary, four days before the death of the wife. Page [125]

And the original writ of covenant bore teste 15 Jan. returnable *crastino pur.* and the *Dedimus potestatem* 18 die Jan. And James Warcombe, cousin and heir of the said Johan, complained by bill against Edward Carrell for obtaining of the said fine by indirect practice; and thereupon the sentence of the honourable court ensued thus: See 3 Co. 77, 78. 5 Co. 2 Part, 124.

" This day a right honourable presence being assembled in
 " this court, the matter depending in the same, between
 " James Warcombe, Esquire, complainant, and Edward Carrell, of London, Gent. defendant, as well for and concerning the validity of the fine levied by the said Edward Carrell, and Johan his late wife, of certain manors, &c. of
 " the inheritance of the said Johan, which Johan, as the
 " plaintiff doth allege, was not of full age at the time of the
 " fine levied; as also for certain sinister and undue means
 " committed and done by the said Edward Carrell, in the suing and getting out of the said fine, as is supposed and alleged by the said complainant, was by great and long deliberation heard and examined, with all the allegations and sayings that could be alleged and said on both parts."

Upon hearing of which matter the said fine was by the whole opinion of the court adjudged good, available and effectual in the law.

And also no fault adjudged to be in the said Edward Carrell, in the suing and getting out of the said fine, but that the same was duly and orderly sued out, according to the due form and order of the laws of this realm. And all this is within the rule, *facta tenent multa quæ fieri prohibentur*: and the heir hath *damnum absque injuria*, for the law doth not give him any remedy to reverse it.
 And

And as Edward Carrell was not punished, although that he knew that his wife was within age; so the said Hungate shall not be punished, although that she knew that her son was within age; and that the rather, by reason of the ancient verse,

*Leges communes si nescit fœmina, miles,
Clericus, & cultor, judex sibi parcat & ultor.*

And by sentence all were dismissed, &c.

Appeal of Robbery.

H. P. C. 184.
1 Inst. 289.
Bro. Appeal
100.
1 Danv. 490.
2 Hawk. c. 23.
sect. 44, &c.

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AMONGST the records in the Treasury, *et inter placita coram domino Rege de termino Sancti Mich. anno 42 Ed. 3. rot. 27.*

*Cornubia. Helena, filia Hugonis Allot, brought an appeal of robbery against Lawrence Boikosleake, Richard Cohorta, Jo. Gilman, and Johan his wife, and divers others; the defendants plead not guilty, &c. and were found not guilty of the felony aforesaid, nec unquam se subtraxerunt, ideo prædictus Laurentius & omnes alii, &c. eunt inde quieti: et prædicta Helena pro falso appello suo committitur prisonæ in custodiâ Marescalli Ric. de Inworth, Marescalli, &c. Et super * hoc prædictus Laurentius & alii petunt juxta formam statuti quod juratores hoc inquirent quæ damna prædicti Laurentius et alii sustinuerunt occasione falsi appelli prædicti: et si prædicta Helena sit sufficiens ad damna solvenda: et super hoc quæsitum est a præfatis juratoribus quæ damna prædictus Laurentius et alii sustinuerunt singulatim occasione prædicta. Qui dicunt quod prædictus Laurentius sustinuit damna ad valentiam 10l. Et Richardus Cohorta ad valentiam 10l. & Johannes Gilman 5l. & Johanna uxor dicti Johannis Gilman 5l. & sic singulatim de cæteris: quæsitum est si prædicta Helena sit sufficiens ad aliqua damna solvenda. Qui dicunt, quod non. Quæsitum, quis vel qui abbettavit vel abbetaverunt præfatam Helenam ad appellationem prædictam prosequendam. Qui dicunt, quod Johannes Riddel, senior, Johannes Riddel, junior, Tho. Drury & Alicia Allet, abbettaverunt præfatam Helenam, ideo ipsi distringantur secundum formam statuti ad respondendum, &c. Out of which record these things are to be observed.*

See 2 Hawk.
ch. 7. sect. 9.
ch. 23. sect. 44,
45, 47, and 48.

1. Although it is enacted by the statute of Westm. 2. cap. 21. that in this case *Justiciarii, &c. puniant appellatorem per prisonam unius anni, &c.* and according to the court com-

Part XII. Appeal of Robbery.

committed to prison, &c. so that they were notailable, yet *quia eadem Helena pregnans fuit & in periculo mortis*, she was let out upon mainprise to have her body, 15 Mich. *ad satisfaciendum prædicto Laurentio et aliis de damnis singulatim adjudicatis occasione prædicta*: and the reason of this is, for this, that the common law requires in every case conveniency; and it is inconvenient that a woman with child should remain in common gaol *sub salva et arcta custodia*, where women cannot resort to her upon times as necessity shall require forthwith for conveniency; and principally where it is for avoiding the danger of death, the court hath power to put her mainprise until she be delivered, for it ought to be a truth concerning the Judges of the common law, which the moral poet hath spoken,

Reddere personæ scit convenientia cuique.

And with it agrees that advice which Bracton gives to the Judges, lib. 2. cap. 2.

Considerent judices efficaciter quid oportuerit secundum necessitatem, quid expedierit secundum utilitatem, quid ligatum fuit secundum permissionem, et quid deceat secundum honestatem.

2. That the defendants recover their damages either wholly against the principal, or wholly against the abettors, and not part against the one, and part against the other; and that the record is *quæsitum est, si prædicta Helena est sufficiens ad aliqua damna solvenda*: and with this it is agreed in 8 Ed. 4. 3.

3. Although that the statute saith, *restituant appellatores damna appellatis*, yet the damages shall be *singulatim* assessed; for that the words are further, *secundum discretionem justiciariorum, habito respectu ad prisonam vel arrestationem, &c.* So that forasmuch as the causes of damages are several, as the defamation, &c. of the one may be greater than of the other, so the damages of the one may be greater than of the other.

4. That although that the appellor be not sufficient for to pay, yet his body shall be taken *ad satisfaciendum*. *Quia qui non habet in ære, luet in corpore.*

5. That although that the jurors in the appeal have found the defendants abettors, yet insomuch as they are strangers to the original, they shall not be concluded, for they shall be distrained *ad respondendum*: and so that they may plead not guilty, or other plea; *quia res inter alios actæ alteri nocere non debent.*

Vide

Rast. Ent.

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Vide the Book of Entries, title, Appeal, *divisione* damages 1 & 2. And this doth appear also by the said statute, which says, that *si abettor * convictus sit de hujusmodi abettat' per malitiam, puniatur per prisonam & tenetur ad restitutionem damnorum faciendam.*

Durefs per Gaoler.

2 Hawk. c. 24.
sect. 20.

PLACITA coram Rege apud Ebor' in crastino Sanctæ Trin. an. 7 Ed. 3. 44. *divisione* indictment (are very worthy of observation;) the effect of one indictment was, *quod ubi quidam Robertus de Bayons de Tunelby captus fuit & in prisonâ Castri London' detentus pro quodam debito statuti mercatorii in custodiâ Thomæ Botelier Constabularii Castri de London' ubi ipse Thomas le Botelier posuit ipsum Robertum in profundo gaolo, inter leones et vili prisona contra formam statuti, &c. viz. de 1 Ed. 3. & in eodem profundo detinuit quosque idem Robertus fecit finem cum eo de 40s. quos ei solvit et hoc per exactionem.*

Item præsentant, that one Wellingtoner was arrested for trespass at the suit of James Cantelupe, and detained in the said gaol, the said Thomas for forty shillings *ad largum ire permisit: idem Wallingoner ire non potuit quousque finem fecit cum Roberto de Barton Clerico de dimidio Marcæ quod ei solvit et ulterius pro ferris, &c.*

Item præsentant, that one John Aylmer of Digby purchased of Thomas Lord of Bardolfe, one messuage, &c. *ibi venit magister clericus eschetonis colore officii sui, et absque aliqua causa dictam terram seisivit in manus domini Regis et noluit ipsum Johannem permittere terram suam prædictam habere quousque idem Johannes finem fecisset cum prædicto magistro Roberto 40s. quos cepit per extortionem & nunc manum suam amovit.*

Item præsentant, quod ubi Thomas Balivus wapentachiæ de Flaxwell et Laughton, tenet wapentachiam suam super proclamationem, et illa proclamatio debet fieri solenniter in villâ de Lasford et Kirby, super quam proclamationem homines wapentachiæ possent pervenire ibi: prædictus Thomas non fecit proclamationes suas per quod homines patriæ amerciati sunt graviter, & hujusmodi amerciamenta de iis levata fuerint, & hoc per extortionem: to which

Part XII. False Affidavits.

which he appeared and pleaded not guilty, and was found guilty, and fined and imprisoned.

Item præsentant, quod Thomas de Maudon Balivus wapentachia de Boby et Grafton, tenere debuisse 2 wapentachia in diversis locis ad aisiamentum patriæ prout de jure deberet. Idem Thomas tenebat ambo wapentachia in uno loco, ad maximum damnum populi wapentachia prædicta, et homines eorundem wapentachiorum nimis excessive fuerint amerciati

Item Thomas Carleton, under Sheriff of the county of Lincoln, was indicted for this, that one Barthol. de Lotgrave purchased a writ against Nicholas de Nottingham, and delivered the said writ to the said Sheriff, who returned à Trade upon the said writ, although the said writ was sufficiently in time delivered: et sic fecit iterum, &c.

False return.
Qu. 1 Danv.
179, 180.

Item Hugo de Baxter latro notorius indictatus de feloniam non fuit replegiabilis et quod malæ famæ extitit.

False Affidavits.

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IN an action *sur le case*, it was resolved *per totam curiam*, that if a Sumner return one certified upon his oath in court-christian, where in truth he was not, and he is pronounced *contumax*, and after he is excommunicated, he shall have an action *sur le case*, for here is *injuria et damnum*. And in such case the plaintiff shall have judgment to recover, for although that the proceeding and oath touching this matter are ecclesiastical, yet the damage is temporal, for he is disabled to sue in any court.

Case of a false
return by a sum-
ner.
Fitzgib. 174.

And it was resolved, that perjury, by which damages do accrue, may be punished as a misdemeanor at the suit of the King.

And also the party may have his action upon the case to recover damages, for it should be a very great defect in the law, and encouragement to parties, if men may commit perjury with impunity: and for that reason, if jurors use perjury themselves, an attaint lieth at the common law, for so it appears by Glanvill, lib. 2. cap. 29. 15 H. 8. tit. Attaint 76. 6 H. 3. ib. 73 & 75. and in the time of Ed. 1. Attaint 70. for the first act, which gave the attaint; the statute of West. 1. cap. 38. *Vide F. N. B.*

109. *Vide* 2. 7 H. 6. 25. one who was to be a pledge affirmed upon his oath, that he could dispend 40s. *per annum*, and upon re-examination he confessed it false, for which he was committed to the Fleet, until he made a fine, which proves, that the false oath was the wrong and injury, and punishable by the law, & *ex consequenti*, when damage follows to the party, he shall have remedy by action upon the case.

In like manner it was agreed, that if one make a false affidavit by which the party is arrested and molested by process of contempt, he may have an action *sur le case*, and recover damages. And although that when the matter is merely ecclesiastical, the court-christian may punish *pro salute animæ*, yet they cannot award any damages to the party, for if one within holy orders be beaten, they may proceed against the delinquent *pro salute animæ*, but the Priest ought to recover his damages by action of battery; so notwithstanding that they may punish the said Sumner in the case at the bar, for perjury and false certificate, yet the party grieved shall recover his damages at the common law, and although the matter be merely ecclesiastical, yet if the party grieved hath damages either by any wrongful proceedings of the Judge, or misfeasance, or non-feasance, * or falsity of any minister, or by unjust prosecution of the party, the party grieved may have an action *sur le case*, and recover his damages.

Doctor and Student 118, 119. *Action sur le case*, lieth against the Ordinary, for a wrongful excommunication touching any thing out of his jurisdiction, so there are many other good cases: and the case in Fitz. 47 H. 6. 8. If an Archdeacon refuse to induct the Clerk, &c. he shall have an action upon the case, which was affirmed for good law by all the court, with which agrees 26 H. 8. 3. a. and true it is, that it is held in 38 H. 6. 14. that in such case he shall have remedy against the Archdeacon to punish him; but saving the opinion there, they cannot award him damages in such case, but he shall recover them at common law: so F. N. B. 92. If a man proceed against a prohibition, the party may have an action upon the case against him for prosecuting in court-christian. *Vide* Trin. 20 Ed. 3. rot. 46. in the Treasury, Rich. Tresil's case, there he recovered damages against the Bishop of Norwich, by him excommunicated after prohibition; *Episcopus adjudicatur esse illicitum expugnatorem auctoritatis Regiæ, & querens recuperavit decem mille libras, simile Pasch. 13 Ed. rot. 78.* Philip * de Hardesthal's case, Hil.

* See Carthew
487.

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HABEAS CORPUS.

Hil. 32 Ed. 3. rot. 78. Sir Thomas Seaton, Knt. recovered against Lucy, who was the wife of Robert Cockfide, for suing to Rome *pro transgressione facta per ipsum Thomam, pro captione bonorum & catallorum suorum & pro debitis, & inde pronuntiari fecit sententiam excommunicationis, &c.* he recovered by verdict damages to three thousand pounds, &c. Trin. 37 Ed. 1. costs were recovered against the Archbishop of Canterbury, forty pounds *pro damnis, per quod ipsum excommunicavit pro executione brevis Regis pro manu fortia amovendo. Ideo Episcopus capt. Mich. 29 Ed. 3. rot. 19 similiter:* and divers other records you may see in my Book of Precedents.

HAWKERIDGE's Case.

Pasch. 14 Jacobi I.

Habeas Corpus.

AN *Habeas Corpus* to the Marshal of the Admiralty granted in Hilary term last past, for Hawkeridge, prisoner in the custody of the said Marshal, who did return *quædam causa spoli, &c. contra Hawkeridge pendet inde pro judicio & sententia parata sit, &c.* Qui quidem William Hawkeridge sic commissus remanet donec ante dicta causa per præfatum Daniel' Dun certificata fuerit, et hæc est causa. And also upon another *Habeas Corpus*, he made such a return, and otherwise *parata sit, &c.* which the court took to be very insufficient, and gave divers days to amend the return, and to shew the cause of delay, and for why sentence was not given, forasmuch as *sententia fuit parata*, or otherwise a man may be in perpetual prison: and the Marshal would not amend his return, upon which the party being in prison sixteen or eighteen weeks, always the return was *est parata, &c.* so the cause was long *parata ad judicium, sed nunquam judicata:* and after in another writ returnable *crastino Ascensionis*, was another return of *parata, &c.* without shewing cause of delay: also it seems the return was insufficient for another cause, *viz. quædam causa spoli civilis & maritima quæ coram, &c.* which is too general for two causes.

Ant. 69, 104,
&c. Admiralty.
See 13 Co. 51,
52, &c.

1. For

1. For that (*spolii*) is uncertain, and ought to be specified in some more certainty of what things, or of, or in what things in particular, and does not shew any value of the goods.

13 Co. 51, 52.

2. That *maritima est super littus*, or *in portu maris*, for those appertain or are next to the sea, and yet the Admiral hath not jurisdiction *super littus maris*, or *in portu*, for that they are *infra corpus comitatus*, as appears in many books and records. And so it was adjudged in Lacy's case, that *infra* the high water-mark, and low water-mark, when the sea is at an ebb, it is within the body of the county, Dy. 15 El. the Abbot of Ramsey's case, yet this is *maritima*, 15 El. Dy. fol. 326. Pasch. 17 El. in *Scaccario ac contra Diggs*; for which cause he ought to have said *super altum mare, infra jurisdictionem Admiralli*; for the statute of 13 R. 2. cap. 5. 2 H. 4. cap. 11. 19 H. 6. 7. confine him only *super altum mare*: and the return which concerns the imprisonment of the body ought to be certain.

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But for the first, all the court resolved, that it was insufficient: also there was shewn no time of the spoil; and for this, in the same term, for the insufficiency of the return which the court could not obtain to be amended, the said Hawkeridge was bailed in open court until the next * term: also the words are *quædam causa spolii ac civilis ac maritima*. Vide 28 H. 8. cap. 15. that upon an insufficient return the party ought to be bailed or discharged, as all our books and infinite precedents are. Vide 6 H. 6. 44. otherwise if the return shall be insufficient when it is false. And note the proceeding was *civiliter*, for to have restitution, *et non criminaliter*.

Judgment and Execution in Treason and Felony.

NOTE, that it was said by some, that when judgment is given, that one shall be hanged until he be dead; the King cannot alter the judgment, and command that he shall be beheaded, for that the execution ought to be conformed to the judgment: and with this accords 35 Hen. 6. folio 58. & Stamford, lib. 1. fol. 13. Vide 27 Aff.

Part XII. Judgment and Execution, &c.

27 Aff. pl. 41. *Vide F. N. B. 144.* where it seems that he may be beheaded, 22 Aff. pl. 49. One was beheaded for killing of Adam Waltam, the King's Messenger, which is there taken for petit treason. But when one is attaint of treason, his judgment is to be hanged by the neck, and cut down alive, and his entrails and privy members cut off from his body, and burnt in his sight, his head to be cut off, his body to be divided into four parts, and disposed of at the King's will; so that in such case the King may pardon all the execution, but decapitation, for this is parcel of the judgment, and the King may pardon all or any part at his pleasure; and it was resolved that the Duke of Somerset, forasmuch as his judgment was to be hanged by the neck could not be beheaded, for that would alter the judgment. And so it was resolved in the case of the Lord Sturton in the time of Queen Mary, and of the Lord Dacres in the time of H. 8. both which were hanged for felony.

It was resolved also, that King H. 8. could not by the law behead his wives for treason, for *judicandum est legibus, non exemplis.*

And note, that when a nobleman is attaint of treason, and hath this judgment as is aforesaid; the course is, that the King makes his letters patent directed to the Lord Chancellor of England, reciting the attainder; yet we minding to dispense with that manner of execution of judgment, in respect that the said A. B. is a nobleman, do therefore by these presents remit and release the said A. B. of and from such execution of judgment, and instead thereof, our pleasure is, to have the head of the said A. B. cut off, &c. as in such cases hath been used, touching and concerning noblemen: and by the same do require the Lord Chancellor to make two writs under the great seal, one to the Lieutenant to deliver the said prisoner, and the other to the Sheriff of London, to receive and execute the said prisoner, &c. And the case of the Lord Sanchar was stronger, for that he was not noble within England, &c.

Oath before Justices.

Trin. 9 Jac. 1.

Justices power
on the statute
7 Jac. 1. c. 6.
See 11 Co. 63.b.
2 Hawk. c. 10.
sect. 2. 34. ch.
11. sect. 2, 3.

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IN this very term, I moved the Justices in Serjeants-Inn in Fleet-street, upon the statute *anno 7 Jac. cap. 6.* which gave power to two Justices of Peace, to require any person or persons, &c. and in some cases one Justice of Peace only, if the Justices of Peace may make a special warrant to Constables, &c. to have the bodies of parties, who are to take the oath according to the statute before them. And it was resolved by all *una voce* that they may, and that for two reasons:

1. When the statute gave power to Justices of Peace to require any person or persons, &c. to take the oath, the law *implicite* gave them power * to make a warrant to have the body before them, for *quando lex aliquid alicui concedit, conceditur & id sine quo res ipsa esse non potest.*

2. It is against the offices of the Justices, and of the authority given them by the statute, that they shall go and seek the parties: and principally in a case of so great consequence. Then I moved, if in such case the Constables may break the houses of the parties named in their warrants: and it seemed to us all that they cannot, for that they are not any offenders until they refuse to take the oath before them who have authority to tender it to them, or commit some contempt to the King; and inasmuch as they are not yet offenders, nor are indicted or charged by any matter of record. their houses * cannot be broken by warrant made by construction upon the statute, by which authority is given, &c. to require them to take the oath, *vide* statute 7 Jac. and see in it, that Barons and Baroneses, as to the tender of the oath, need not to be indicted, &c. for these words, "of or above the said age or degree," are to be intended of the same age, and above the said degree, or otherwise the first clause concerning Barons should be idle; *vide* those who have power to tender the oath to them of the nobility, have power to commit them upon refusal to the common gaol, by the general act; and if any person or persons being of the age of eighteen years,

or

* See 6 Mod.
105, 210.
1 Salk.

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or above, shall refuse to take the said oath duly tendered, &c. which clause extends to all before.

Note, if the person be fugitive in another county, he evades the statute for the present; but he may be indicted for recusancy, and the indictment may be removed into the King's Bench, and they may make process against them in any county of England: also if they are in their houses, the door being shut, &c. then they may be indicted either before the Justices of Assize, or before the Justices of Peace at the quarter-sessions, and then after a *Venire facias*, &c. by force of a *Capias*, their houses may be broken by the Sheriff, *vide stat. 10 Eliz. cap. 2.* (to which the statute of 23 Eliz. refers, &c.) such process is given in case of not repairing to church, as in indictment of trespass, which is *Venire facias, cap. &c.*

Memorandum, Hil. Term, 9 *Jacobi*. All the Justices of England, by commandment of the King, signified by the Lord Chancellor, were assembled to have consideration of these two statutes. And in the beginning of this term, the said points were recited and debated; and after good consideration severally, and conference had all together, it was resolved by all, that if one be indicted for recusancy, the court may proceed by process upon the statute of 23 Eliz. or by proclamation according to the statute of 28 Eliz. And that the process upon the indictment, for recusancy, is *Ven' fac'*, *Capias*, &c. which is the process in indictment of trespass; and upon the *Capias*, the Sheriff upon request first made to open the door, may do it, according to the resolution in Seyman's case; and when the Sheriff has brought him into court, he may, upon refusal of taking his oath, be generally indicted as before Justices of Assize, or in open sessions of the peace upon refusal before them: but the Justices upon the second day of conference, did not speak to the other point. And after this resolution was reported to the Lords of the Privy Council at Whitehall, in the presence of all the Justices of England, the seventh day of *Feb in Termin. Sancti Hil. 9 Regis*, and the Lord Chancellor desired that we should put our resolutions in writing; to which I answered, that the Judges never used to put their resolutions in writing; but that if the Attorney or Solicitor come to us (as the ancient use hath been to our predecessors) we will deliver our opinions to them again *ore tenus*, but not in writing.

* At the third day of the conference in this very term, it seemed upon the statute 3 *Jac.* if Justices of Peace upon

O 2

refusal

Stat. 10 El. c. 2.
23 El. c. —

Recusancy
2 Hawk. c. 27.
sect. 29.
Antea 1, 2.

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Stat. 3 Jac. I.
c. 4.

Co. 63. b.

Stat. 7 Jac. I.
c. 2. and 6.

refusal before them, commit any person to gaol without bail or mainprise, and mention in their warrant the tender and refusal, then the Justices of Assise, or Justices of Peace, ought to tender the oath again, and to have a special indictment; for the words of the act 3 Jac. are "and if the said person or persons, or any other whatsoever," &c. so that this word (*other*) excludes the persons who were committed for refusal. But it seems if the *Mittimus* of the Justices of Peace, &c. do not comprehend any tender and refusal of the oath, then they may be generally indicted, as upon refusal in open court, for the court cannot take notice of the former tender and refusal in such case: and it was resolved, that the major number of the Justices of Peace who commit the parties, have election to commit either to the next assises, or the next sessions; for the words of the statute being in the disjunctive, some may be more apt to be committed until the next assises, and some until the next sessions: and it is to be observed, that two Justices, of which the one is to be of the *quorum*, by the statute 7 Jac. may commit any person above the age of eighteen, and under the degree of nobility, although that he be not indicted, nor convicted, &c. But a Justice of Peace cannot commit any unless they be prosecuted, indicted, or convicted, &c. according to the statute 7 Jac. And it was resolved by all, that if the indictment be commenced upon the stat. 3 Jac. upon refusal in open court, the indictment may be short and general, of what the parties are indicted, &c. and not so, if the indictment be upon the commitment made by two Justices of Peace; this is good of any person whatsoever, but in such case, if the *Mittimus* be especial, comprehending the tender of the oath and refusal, there ought to be a special indictment and refusal in open court. Also if the Justice of Peace make a special *Mittimus*, then the indictment ought to be special, *scil.* to recite that the party was indicted or presented, &c. in certain, according to the statute 7 Jac. and that he refused before one Justice of Peace, or otherwise in open court; but if the *Mittimus* be general, as is aforesaid, then the indictment before Justices of Assise at the assises, or Justices of Peace at the sessions of peace, may be general upon the statute 3 Jac.

The Earl of Northampton's Case.

Mich. 10 Jacobi 1.

THE Attorney-general informed against Thomas Gooderick, Gent. Sir Richard Cox, Kt. Hen. Vernon, Gent. Henry Minors, Serjeant of the Waggons, Tho. Lake, Gent. and James Ingram, Merchant, *ore tenus* in the Star-chamber, the last day of the Star-chamber, and charged Gooderick that he had spoken and published of the Earl of Northampton, one of the grandees and Peers of the realm, one of the King's Privy Council, Lord Privy Seal, and Lord Guardian of the Cinque-ports, divers false and horrible scandals, *scil.* that more Jesuits, papists, &c. have come into England, since the Earl of Northampton was Guardian of the Cinque-ports, than before.

Scand' magnat'
See 1 Cro. 97.
2 Cro. 196.
Plow. 37.
Hetley 55.
1 Leon. 336.
Kelw. 26.
2 Inst. 223.
1 Roll Abr. 34.
Hob. 35.

2. That the said Earl had writ a book openly against Garnet, &c. but * secretly he had writ a letter to Bellarmine, intimating that he writ the said book *ad placandum Regem, sive ad faciendum* [*placendum*] *populum*, and requested that his book might not be answered; and that the Archbishop of Canterbury had certified it to the King, and that the said Gooderick did relate it to one Dewsbury, a Bachelor in Divinity, who had acquainted the said Earl with it. Gooderick being examined, confessed the words spoken; but to extenuate his offence said, that he was not the first founder: and he vouched the said Sir Richard Cox, who confessed that he related to Gooderick the matter concerning the book of the Earl, and his letter to Bellarmine, but not the words concerning the Cinque ports; and that the Archbishop of Canterbury had informed the King of it, to the intent that the Earl of Northampton should not be Lord Treasurer, and to extenuate his offence, he vouched the said Vernon, who upon examination confessed *that* which Richard Cox had published, but that he was not the first author, but he cited the said Lake, who did likewise confess what Vernon had said, but that he heard it from Serjeant Nichols, who being examined confessed it; and with all, that one Speaket related it to him, and that he had heard it from one James Ingram, and James Ingram

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being examined, confessed the words concerning the said book of the Earl, and of the letter to Bellarmine; and that in the month of October he heard the said words of two English fugitives at Leghorn, and never did publish them until the death of the Earl of Salisbury, Treasurer, who died in May last: and all the said defendants confessed at the bar, all that with which they were charged, and at the hearing of this case were eleven Judges of law, Fleming Justice being absent *propter ægritudinem*.

And so it was resolved, that the publishing of false rumors, either concerning the King, or of the high grandees of the realm, was in some cases punished by the common law: but of this were divers opinions. Yet it was resolved in general.

1. Touching the matter and quality of the words.
2. Touching the persons of whom they are spoke.
3. The manner of contrivance, or publishing of them.
4. Touching the punishment, for which cause divers acts have made declaration, and have put things in certainty.

—And first of all, as to the words or rumours themselves.

1. They ought to be false and horrible.
2. Of which discord or slander may arise betwixt the King and his people, or the grandees of the realm, West. 2. cap. 24. or between the Lords and Commons, 2 R. 2. c. 53. by which great peril and mischief may come to all the realm. *Ibidem*.

The subversion and destruction of the realm, *ibidem*. And for this the said act of 2 R. 2. against rumours, false and horrible messages (*messoignes*) i. e. lies*.

2. As to persons, they are declared to be Prelates, Dukes, Earls, Barons, and other nobles and grandees of the realm, and also of the Chancellor, Treasurer, Clerk of the Privy Seal, Steward of the Household of our Sovereign Lord the King, Justice of the one Bench and of the other, or of any the great officers of the realm, *ut* 2 R. 2. c. 5. and the King is contained within the act of West. 1. cap. 34. as appears in Dyer 5. Mar. 155.

[* Note, these statutes were occasioned by reason of some scandalous reflections, that had been raised by William Wickham, and the clergy, against John of Gaunt, &c. et c. contra.]

Part XII. The Earl of NORTHAMPTON's Case.

3. As to the third point it was resolved, that if one hear such false and * horrible rumours, either of the King, or of any of the said grandees, it is not lawful for him to relate to others, that he hath heard J. S. to say such false and horrible words; for if it should be lawful, by this means they may be published generally, &c. And this doth appear by the said statute, viz. that the party shall be imprisoned until he find out the party who spoke them, which proves that it was an offence, or otherwise he should not be punished for it by fine (for this is implied) and imprisonment. Page [134]

4. It was also resolved, that the offenders at bar, if against them the proceedings had been by indictment upon these statutes, no judgment could be had against them that they should be imprisoned until they found their author: for, for example, Gooderick did not relate to Dewsbury *that* he heard from Sir Richard Cox, but he related the same words as of himself: and for this no judgment can be given against him, that he shall be imprisoned until he find his author; for this that he ought to be indicted for the words which he himself did speak, and then, *de non apparentibus et non existentibus eadem est ratio*. When the indictment is general without any relation to a certain author, the judgment, which always ought to be given of matter apparent within the record, cannot be that he shall be imprisoned, until he hath found his author.

And it was resolved, that if A. say to B. "did you not hear that C. is guilty of treason," &c. this is tantamount to a scandalous publication: and in a private action for slander of a common person, if J. S. publish that he hath heard J. N. say, that J. G. was a traitor or thief; in an action of the case, if the truth be such, he may justify.

But if J. S. publish that he hath heard generally without a certain author, that J. G. was a traitor or thief, there an action *sur le case* lieth against J. S. for this, that he hath not given to the party grieved any cause of action against any, but against himself who published the words, although that in truth he might hear them; for otherwise this might tend to a great slander of an innocent; for if one who hath *læsam phantasiam*, or who is a drunkard, or of no estimation, speak scandalous words, if it should be lawful for a man of credit to report them generally, that he had heard scandalous words, without mentioning of his author, that would give greater colour and probability that the words were true in respect of the credit of the

The Earl of NORTHAMPTON's Case. Part XII.

reporter, than if the author himself should be mentioned, for the reputation and good name of every man is dear and precious to him: and a record was vouched in Mich. 33 & 34 Ed. and in the 30 Ass. pl. 10. and in the Exchequer, Mich. 18 E. 1. rot. 4.

Note, that all the commissions of *Oyer and Terminer* give authority to enquire *de illicitis verborum proparationibus*. *Vide le stat.* 5 R. 2. cap. 6. & 17 R. 2. cap. 8. concerning rumours, and in 3 Ed. 2. in the Exchequer, Henry Bray spoke of John Foxley Baron of the Exchequer: it was resolved, that the judgment in an indictment upon the said statutes, when the words are spoken generally, without relation to a certain author, is, that the offender shall be fined and imprisoned, for this is implied and included in the said statutes, as an incident to the offence, although that it is not expressed. Also the party grieved may have an action *de scandalo magnatum*, and recover his damages. Also the party grieved, and the King's Attorney, if the offenders deny it, may exhibit a bill in the Star-chamber against the offender, in which the King shall have a fine, and the party shall be imprisoned, and the court of Star-chamber may inflict corporal punishment, as to stand upon the pillory, and to have papers about his head.

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* And if the offenders confess it, then to proceed *ore tenus* upon their own confession; and for the publication of the said words, all the defendants were punished by all the *presence, una voce nullo contradicente* by fines and imprisonments; and Gooderick and Ingram were fined the most, for that Gooderick had no authority for the words concerning the cinque posts, nor could Ingram find any author for to vouch, *that* he heard by persons unknown at Leghorn in foreign parts; and therefore it was taken as a fiction of his own.

ESTWICK's Case.

Trin. 10 Jac. I.

In Curia Wardorum.

KING Philip and Queen Mary by their letters patent *de gratia speciali et ex certâ scientiâ et mero motu, &c.* granted to Aringal Wade in fee, the farm or grange called Milton Grange in com' Bedford, parcel of the possessions of the late dissolved monastery of Wooborne, *tenendum prædictam firmam sive grangium de nobis et successoribus nostris, ut de manerio nostro de East Greenwich in com' Kantia in capite per servitium vicesimæ partis unius feodi militis pro omnibus redditibus, servitiis, exactionibus, et demandis quibuscunque*, which grange, by mean conveyance, came to Christopher Estwick, after whose death the tenure was found *verbatim*, according to the words of the patent. And the question was, if the tenure was by a mean, as of the said honour, or *in capite*; * and their principal reason was, that the letters patent of the King shall be construed according to the King's intention expressed in his charter. And in this case of necessity some words ought to be rejected, *scil.* these words (*in capite*) and then the sense will be, *tenendum de nobis, &c. ut de manerio nostro de East Greenwich in com' Kantia per servitium vicesimæ partis unius feodi militis, &c.* or these words, *de manerio nostro de East Greenwich in com' Kantia*, and then the sense will be, *tenendum de nobis, &c. in capite per vicesimam partem unius feodi militis, &c.* for both together cannot stand; and then the better shall be taken for the K. as in 5 Mar. Dy. 162. tenure of the King *per servitium militare*, is to be intended tenure *in capite*. So tenure *de quo vel quibus & per quæ servitia ignorant*, is tenure *in capite*, for the best shall be taken for the King. *Vide 15*

King's grant
how expounded.
1 Co. 43, &c.
2 Co. 32, 50, 54.
5 Co. 73.
4 Co. 34, 35, 102.
9 Co. 100.
10 Co. 63, 109,
&c.

* It was argued
to be a tenure in
capite.

H. 7.

H. 7. 7. 14 Ed. 4. 5. & 3 H. 7. 12. 9 H. 7. 9. 6. *per* Hufsey, 13 H. 7. 4. *per* Fineux. 19 H. 8. title Office. Brook 58. Action. Another reason was added, that if these words, *in capite*, shall be rejected, then the words ensuing, *scil. per servitium vicesimæ partis unius feodi militis, &c.* shall be rejected here; and then the tenure will be by one entire fee of a Knight, for words in the middle of a sentence may be extracted, and as well the consequent as the precedent stand.

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See Cotton's
Records 107.
a Tenendum in
capite as of the
castle of Dover.

But it was answered and resolved, that the said Grange was held of the King as of the honour, and not *in capite*; and the reason was for this, that tenure of the King *in capite* is as much as to say, tenure in gross, or of the person of the King: and for this, that the chief and principal part of the body of the tenure of the person of the King is said *in capite*. And it appears by ancient records, that in ancient time all tenures in gross, or * of the person of a subject, were called tenure *in capite*; as in clause 9 H. 3. Membr. 28. *Robertus filius Madock tenuit terram de Thoma Corbet in capite*: and in the same manner you shall find by many other records, lands to be held of subjects *in capite*, which we call tenure of the person, or in gross, but of late time *dicitur de Rege solummodo, terras teneri in capite*. Then it is as much as to say, *tenendum de nobis, &c. ut de manerio nostro de East Greenwich in gross, ut de personâ nostrâ*, which is against the nature of a tenure in gross, or of the person, when the land is expressly limited to be holden of a manor, &c. And for this, if the said words should be transposed, *scil. tenendum de nobis in capite ut de manerio nostro de East Greenwich, &c.* this will not alter the case; so when in the beginning or end, the land is expressly limited to be held *ut de manerio*, the tenure of the person is abundant; or it may have this sense, that the King is *caput totius regni*: and for this, inasmuch as it is limited to hold of the King, who is chief, it may be vulgarly said, that the tenure is in chief, inasmuch as it is of the King as of a manor.

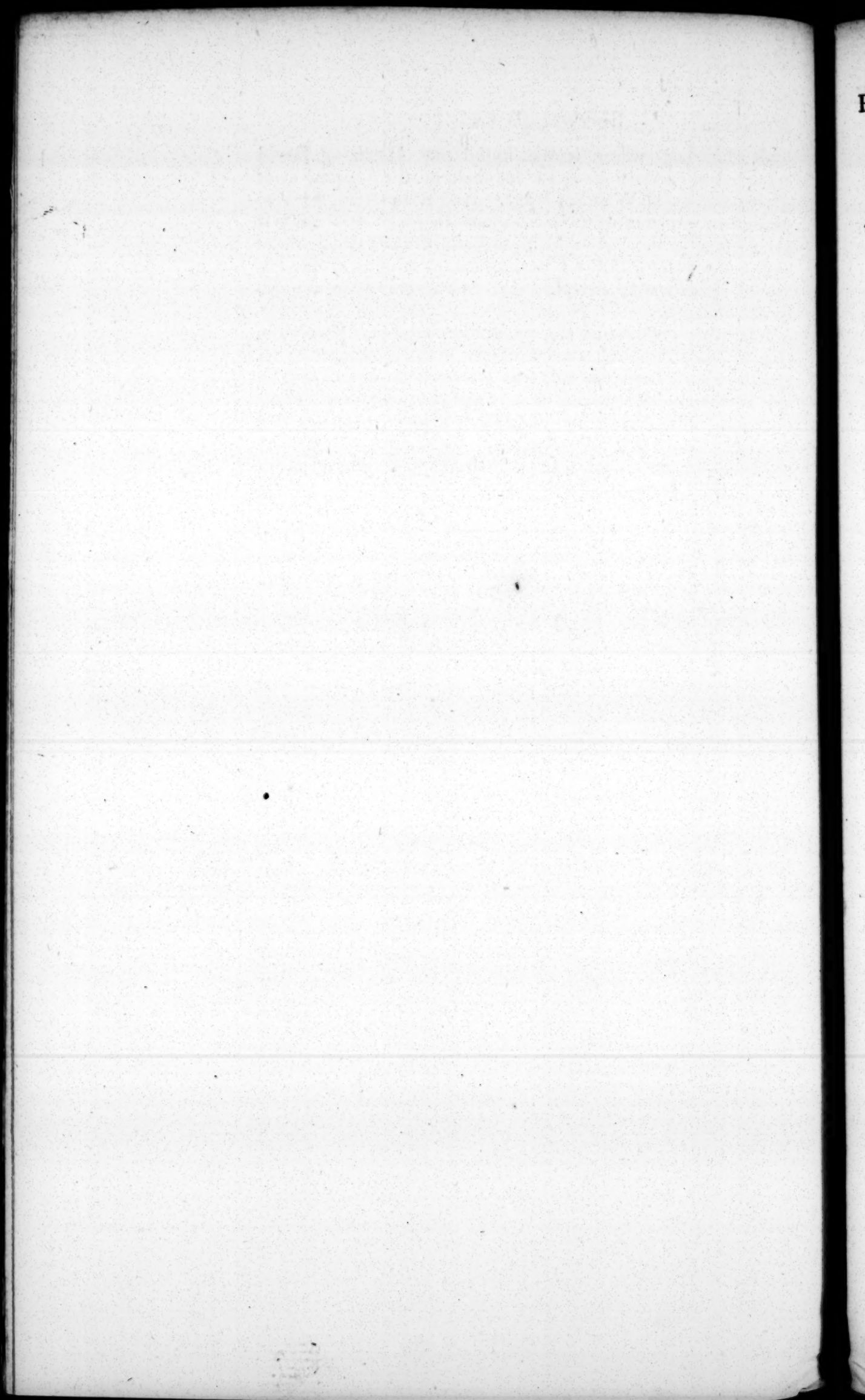
And as to the second objection, it was resolved, that the abundant words shall be extended in construction of the law, and not the words subsequent, which doth limit the term in certainty: and with this resolution in the principal point agrees Mich. 17.

Part XII.

ESTWICK'S CASE.

& 18 Eliz. 345. where it was found that Owen ap David was seised of certain land in fee held of the Queen, as of the principality of Wales *in capite*. And it was held, *per consilium curiæ*, no tenure *in capite*; and so (as it was said) it was resolved in the time of H. 8. in Baron Luke's case, where lands were granted by the King to hold of him as of the honour of Huntingdon, *in capite*, that this was a mean tenure, and not *in capite*.

Nota, that a tenure of any ancient honour, as of Rawleigh, Hagent, and Peverel, are by usage, and allowance in all ages, taken to have the effect of a tenure *in capite*, *scil.* to have all the lands in guard, &c. *et non valet ratio contra experimentum*. *Vide* the statute of *Magna Charta*, cap. 31. and the 11 H. 7. *in rot. Parlamenti* not printed, and 1 H. 6. c. 4. *Vide* Bracton, lib. 2. fol. 87. 30 H. 8. Dyer 8. 58. 29 H. 8. Brook, title Livery 28, 57. 5 Ed. 3. 5.



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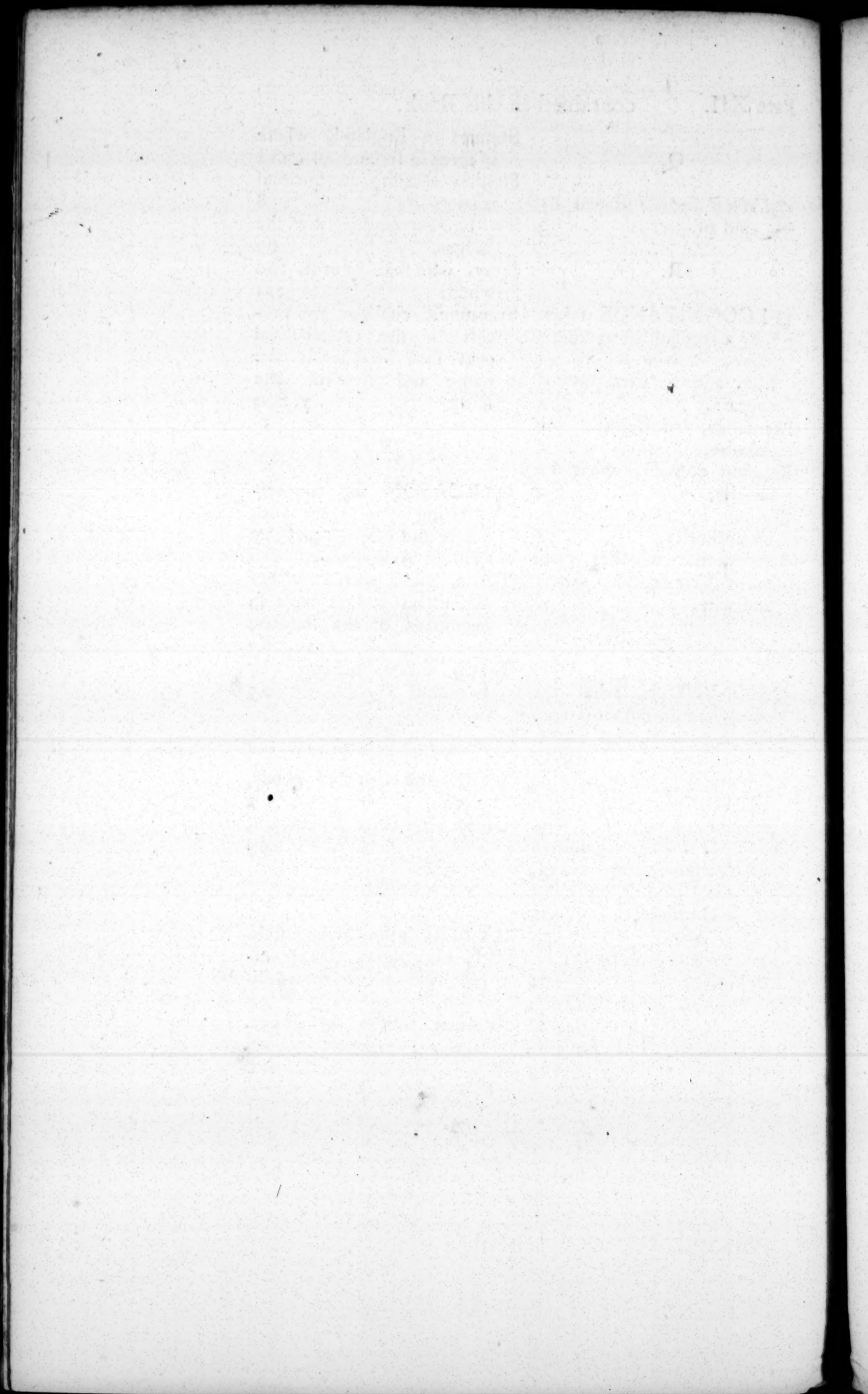
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THE
THIRTEENTH PART.
OR CERTAIN
SELECT CASES IN LAW,

REPORTED BY

Sir EDWARD COKE, Knight,

Late Lord Chief Justice of ENGLAND,

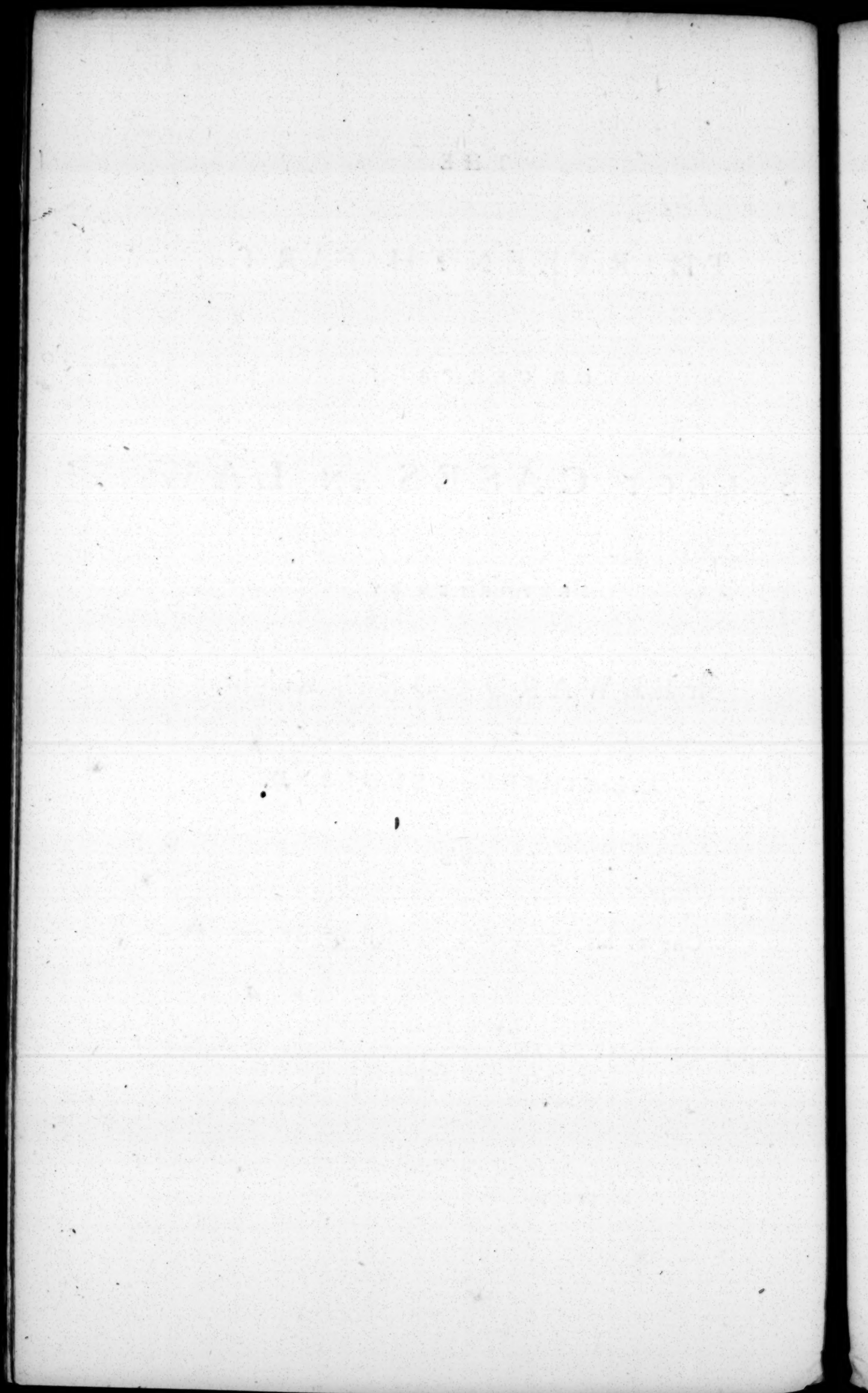
AND

One of his MAJESTY'S Council of STATE.

The FIFTH EDITION, carefully corrected; with the Addition of
REFERENCES to all the later Reports.

First published in 1659.

With two exact TABLES, the one of the Names of the Cases, and the other of
the Principal Matters therein contained.



TO THE

R E A D E R.

READER,

IT may seem altogether an unnecessary work to say any thing in the praise and vindication of that person and his labours, which have had no less than the general approbation of a whole nation convened in Parliament: for if King Theodorick in Cassiodore could affirm, *Neque enim dignus est a quopiam redargui qui nostro judicio meretur absolvi*, that no man ought to be reproved whom his Prince commends; how much rather then should men forbear to censure those and their works, which have had the greatest allowance and attestation a senate could

P 3

give,

To the R E A D E R.

give, and to acquiesce and rest satisfied in that judgment? Such respect and allowance have been given to the learned works of the late honourable and venerable Chief Justice, Sir Edward Coke, whose person in his life-time was revered as an oracle, and his works (since his decease) cited as authentic authorities, even by the reverend Judges themselves. The acceptance his books (already extant) have found with all knowing persons, have given me the confidence to commend to the public view some remains of his, under his own hand-writing, which have not yet appeared to the world, yet (like true and genuine eaglets) are well able to behold and bear the light: they are of the same piece with his former works, and in respect of their own native worth, and the reference they bear to their author, cannot be too highly valued: though, in respect of their quantity and number, the cases reported are but few; yet, as the skilful jeweller will not lose so much as the very filings of rich and precious metals;

To the R E A D E R.

tals; and the very fragments were commanded to be kept where a miracle had been wrought, *propter miraculi claritatem & evidentiam*: so these small parcels, being part of those vast and immense labours of their author, great almost to a miracle (if I may be allowed the comparison), were there no other use to be made of them (as there is very much; for they manifest and declare to the reader many secret and abstruse points in law, not ordinarily to be met with in other books so fully and amply related) deserve a publication, and to be preserved in the respects and memories of learned men, and especially the professors of the law; and to that end they are now brought to light and published.

I Here the preface to the first ed.ⁿ of this 13th parts of L. Coke's Reports contains the following additional words: & If any should doubt of the truth of these Reports of Sir Edward Coke they
Farewel.

X^a may see the original manuscript
 "in French written with his
 own hand at Henry Wyford's
 shop in Vine Court Middle
 Temple."
W. H.

J. G. Wyford was
 one of the book-
 sellers for whom
 the first ed.ⁿ of
 this 13th Report
 was printed.
W. H.

P

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O F T H E
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WILLOWES's

WILLOWES's Case.

Mich. 6 Jac. 1.

In the Common Pleas.

IN trespass brought by Richard Stallon, one of the attornies of the court, against Thomas Brayde (which began in Easter term, *anno 6 Jacobi Rot. 1845.*) for breaking of his house and close at Fenditton in the county of Cambridge; and the new assignment was in an acre of pasture: the defendant pleads, that the place where, &c. was the land and freehold of Thomas Willowes and Richard Willowes; and that he as servant, &c. And the plaintiff for replication saith, that the place where, was parcel of the manor of Fenditton, and demisable, &c. by copy of court roll in fee-simple: and that the lords of the manor granted the tenement in which, &c. to John Stallon and his heirs, who surrendered them unto the said Willowes and Willowes, lords of the said manor, to the use of the plaintiff and his heirs, who was admitted accordingly, &c. The defendant doth rejoin, and saith, that well and true it is, that the tenements in which, &c. were parcel of the manor, and demisable, &c. And the surrender and admittance such, *prout, &c.* But the said Thomas Brayde further saith, that the tenements in which, &c. at the time of the admission of the said Richard Stallon, were, and yet are of the clear yearly value of fifty-three shillings and four pence; and that within the said manor there is such a custom, *quod rationabilis denariorum summa legalis monetæ Angliæ super quamlibet admissionem cujuscunque personæ, sive quorumcunque personarum tenent vel tenent per dom' vel dominos manerii prædicti sive per seneschallum, &c. ad aliquas terras sive tenementa customaria manerii prædicti secundum consuetudinem manerii illius debetur, et a tempore quo, &c. debet fuit dom', &c. tempore ejusdem admissionis pro fine pro ad-*

Copyhold fine reasonable.
See Moor 622, 623. Cro. Eliz. 351, 379. Cro. Jac. 195, or 296. Co. Lit. 59. b. 60. a. 4 Co. 27. b. Cumberb. 44. Skin. 248, 249.

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WILLOWES's

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Mich. 6 Jac. I.

In the Common Pleas.

IN trespass brought by Richard Stallon, one of the attornies of the court, against Thomas Brayde (which began in Easter term, anno 6 Jacobi Rot. 1845,) for breaking of his house and close at Fenditton in the county of Cambridge; and the new assignment was in an acre of pasture: the defendant pleads, that the place where, &c. was the land and freehold of Thomas Willowses and Richard Willowses; and that he as servant, &c. And the plaintiff for replication saith, that the place where, was parcel of the manor of Fenditton, and demisable, &c. by copy of court roll in fee-simple: and that the lords of the manor granted the tenement in which, &c. to John Stallon and his heirs, who surrendered them unto the said Willowses and Willowses, lords of the said manor, to the use of the plaintiff and his heirs, who was admitted accordingly, &c. The defendant doth rejoin, and saith, that well and true it is, that the tenements in which, &c. were parcel of the manor, and demisable, &c. And the surrender and admittance such, prout, &c. But the said Thomas Brayde further saith, that the tenements in which, &c. at the time of the admission of the said Richard Stallon, were, and yet are of the clear yearly value of fifty-three shillings and four pence; and that within the said manor there is such a custom, *quod rationabilis denariorum summa legalis monetæ Angliæ super quamlibet admissionem cujuscunque personæ, sive quarumcunque personarum tenent vel tenent per dom' vel dominos manerii prædicti sive per seneschallum, &c. ad aliquas terras sive tenementa customaria manerii prædicti secundum consuetudinem manerii illius debetur, et a tempore quo, &c. debet fuit dom', &c. tempore ejusdem admissionis pro fine pro admissione*

Copyhold fine reasonable.
See Moor 622,
623. Cro. Eliz.
351, 379. Cro.
Jac. 196, or 296.
Co. Lit. 59. b.
60. a. 4 Co. 27. b.
Cumberb. 44.
Skin. 248, 249.

missione illa, quod idem dominus, vel iidem dom' prædict' vel Seneschallus suus curiæ ejusdem manerii pro tempore existen' usus fuit, vel usi fuerunt per totum tempus supradict' in plenâ curiâ manerii illius pro admissione ejusdem personæ, seu earundem personarum sic facta assidere & appunctuare, Anglicè, to assess and appoint eandem rationabilem denariorum summam pro fine pro eadem admissione sic ut præfertur facta, nec non superinde eandem denariorum summam sic assessam & appunctuatam, præfatæ personæ sive personis sic admittæ sive admissis, solveret et solverent, &c. eidem domino, &c. prædictam rationabilem denariorum summam pro fine, pro admissione sua prædict' sic assessam & appunctuat'. And further faith, that the Steward of the said manor at a court holden 1 October, in the fourth year of the reign of the King that now is, admitted the plaintiff to the tenements, in which, &c. and assessed and set a reasonable sum of money, that is to say, five pounds six shillings eight pence, that is to say, *valorem eorundem tenementorum per duos annos, & non ultra pro fine pro prædict' * admissione prædict' Richardi Stallon,* to the said lords of the manor to be paid: and also the said Steward at the same court did give notice, and signify to the plaintiff the said sum was to be paid to the said lords of the manor, &c. And further faith, that the said Willowes and Willowes, afterwards, that is to say, the second day of November, in the fourth year aforesaid, at Fenditton aforesaid, requested the said Richard Stallon to pay to them five pounds six shillings eight pence there, for the fine for his admittance, &c. which the said Richard Stallon then and there utterly denied and refused, and as yet doth refuse. By which the said Richard Stallon forfeited to the aforesaid Tho. and Rich. Willowes all his right, estate, &c. of and in the tenements aforesaid in which, &c. The plaintiff surrejoineeth, and faith, that the said sum of five pounds six shillings eight pence, &c. was not *rationabilis finis*, as the said Thomas Brayde above hath alledged, &c. upon which the defendant doth demur in law. And in this case these points were resolved by Coke, Chief Justice, Walmsley, Warburton, Daniel, and Foster, Justices. 1. And principally, if the fine assessed had been reasonable, yet the lords ought to have set a certain time and place when the same should be paid, because the same stands upon a point of forfeiture: as if a man bargains and assures land to one and his heirs, upon condition that if he pay to the bargainee or his heirs, ten pounds at such a place, that he

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Surrejoinder.

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and his heirs shall re-enter : in that case, because no time is limited, the bargainor ought to give notice to the bargainee, &c. when he will tender the money, and he cannot tender it when he pleaseth ; and with that agrees 19 Eliz. Dyer 354. For a man shall not lose his land, unless an express default be in him ; and the bargainee in such case is not tied to stay always in the place, &c. So in the case at bar, the copyholder is not tied to carry his fine always with him, when he is at church, or at plough, &c. And although that the rejoinder is, that the plaintiff refused to pay the fine ; so he might well do, when the request is not lawful nor reasonable ; for in all cases when the request is not lawful nor reasonable, the party may without prejudice deny the payment. And he who is to pay a great fine as 100l. or more, it is not reasonable that he carry it always with him in his pocket, and presently the copyholder was not bound to pay it, because that the fine was uncertain and arbitrable, as it was resolved in Hubbard's case, in the Fourth Part of my Reports, amongst the copyhold cases. 2. It was resolved, that although the fine be uncertain and arbitrable, yet it ought to be *secundum arbitrium boni viri* : and it ought to be reasonable and not excessive, for all excessiveness is abhorred in law, *excessus in re qualibet jure reprobatur communi* ; for the common law forbids any excessive distress, * as it appeareth in 41 E. 3. 26. Where a man avowed the taking of sixty sheep for 3s. rent, and the plaintiff prayed that he might be amerced for the distress : and the court (who is always the Judge whether the distress be reasonable or excessive) held, that six sheep had been a sufficient distress for the said rent, and therefore he was amerced for so many of them as were above six sheep : and the court said, that if the avowant shall have return, he shall have a return but of six sheep : and this appeareth to be the common law ; for the statute of *Articuli super chartas* extends only where a grievous distress is taken for the King's debt. See F. N. B. 174. a. and 27 Aff. 51. 28 Aff. 50. 11 Hen. 4. 2. and 8 Hen. 4. 16, &c. *Non capiatur gravis distinctio, &c.* And so if an excessive or an unreasonable amerciament be imposed in any * court-baron or other court which is not of record, the party shall have *moderata misericordia* : and the statute of *Magna Charta* is but an affirmance of the common law in such point.

men moderat' secundum quantitatem feodorum suorum & secundum facultates ut nemini graviora viderentur, &c. Vide Bracton, 84. b. rationab' relev' 1. quod rationem et mensuram non excedat ; and see him there 86, &c. optime.

4 Co. 27. b.

* Fitzgib 86, 87.

Vid F.N.B. 82.
a reasonable aid
uncertain until
the statute
Glanvil lib. 9.
fol. 70. 14 H. 4.
9. by Hill.
14 H. 4. 1. a.

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See Glanvil.
lib. 9. cap. 8.
Optime B. ra-
tionalibus
auxiliis, ita ta-

See F. N. B. *Nullus liber homo amercietur nisi secundum quantitatem delicti.* And *gravis redemptio non est exigenda.* And the common law gives an assise of *soviert distress*, on multiplication of distress found, which is excessive in respect of the multiplicity of vexation. And therewith agreeth 27 Aff. 30. 51. *Non capiatur multiplex distressio*, F. N. B. 178. b. And if tenant in dower hath villains, or tenants at will who are rich, and she by excessive tallages and fines makes them poor and beggars, the same is adjudged waste. And therewith agreeth F. N. B. 61. b. 16 H. 3. Waste 135, and 16 H. 7. and see the Register judicial, fol. 25. b. waste lieth in *exulando Henricum, et Harmanum, &c. villanos suos; quorum quilibet tenet unum messuagium et unam virgat' terræ, in villenagio in prædict' villâ de T.* by grievous and intolerable distresses; by all which it appeareth, that the common law doth forbid intolerable and excessive oppressing and ransoming of villains, whereby of rich they become poor: and yet it may be said, that a man may do with his villain what he pleaseth, or with his tenant at will; but the law limits the same in a reasonable and convenient manner: for it appeareth, that such intolerable oppression of the poor tenants is to the disinherison of him in the reversion. So in the case at bar, although the fine is uncertain, (and arbitrary) yet it ought to be reasonable; and so it appeareth by the said custom which the defendant hath alleged. And therefore in such case the lord cannot take as much as he pleaseth, but the fine ought to be reasonable, according to the resolve of the court in the said case of Hubbard in the Fourth Part of my Reports.

4 Co. 27. b.
Vide 14. H. 4. 4.
by Hil.

Braclon l. 2. fel.
51. *Quam longum debet esse tempus non definitur in jure, sed pendet ex iusticiariorum discretionem.*

3. It was resolved, that if the lord and tenant cannot agree of the fine, but the lord demandeth more than a reasonable fine, that the same shall be decided and adjudged by the court, in which any suit shall be, for or by reason of the denying of the fine, and the court shall adjudge what shall be said a reasonable fine, having regard to the quality and value of the land, and other necessary circumstances which ought to appear in pleading upon a demurrer, or found by verdict: and if the fine which the lord or his Steward assesseth be reasonable, let the copyholder well advise himself before he deny the payment of it: and always when reasonableness is in question, the same shall be determined by the court in which the action dependeth: as reasonable time, 21 H. 6. 30. 22 E. 4. 27 & 50. 29 H. 8. 32, &c.. So if the distress be reasonable, and the like, &c.

4. It

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4. It was resolved, that the said fine in the case at the bar was unreasonable, viz. to demand for a cottage and an acre of pasture, five pounds six shillings eight pence, for the admittance of a copyholder in fee-simple upon a surrender made; for this is not like to a voluntary grant, as when the copyholder hath but an estate for life, and leaseth; or if he hath an estate in fee-simple, and committeth felony, there *arbitrio domini res aestimari debet*; but when the lord is compellable to admit him to whose use the surrender is, and when *Cestuy que use* is admitted, he shall be *in* by him who made the surrender, and the lord is but an instrument to present the same: and therefore in such case the value of two years for such an admittance is unreasonable, especially when the value of the cottage and one acre of pasture is on a rack, at fifty three shillings by the year.

Note the difference.

5. It was resolved, that the surrejoinder is no more than what the * law saith, for in this case in the judgment of the law the fine is unreasonable; and therefore the same is but *ex abundanti*; and now the court ought to judge upon the whole special matter; and for the causes aforesaid, judgment was given for the plaintiff.

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And Coke, Chief Justice, said in this case, that where the usage of the court of Admiralty is to amerce the defendant for his default by its discretion, as it appeareth in 19 Hen. 6. 7. that if the amerciament be outrageous and excessive, the same shall not bind the party, and if it be excessive or not, it shall be determined in the court in which the action shall be brought for the levying of it: and the writ of account is against the bailiff, or guardian, *quod riddat ei rationabilem computum de exitibus manerii*. And the law requireth a thing which is reasonable, and no excess or extremity in any thing.

Porter and Rochester's Case.

2 Mich. 6 Jacobi 1.

A

In the Common Pleas.

The statute of
23 H. 8. c. 9.
of citing out of
dioceses.
See 5 Co. 9.
12 Co. 77.
Gibson's Cod.
1046, & 1050.
Post. 15, &c.
See Fitzgib. 110.
2 Salk. 549.
Carthew 476.

THIS term Lewis and Rochester who dwelt in Essex within the diocese of London, were sued for subtraction of tithes growing in B. within the county of Essex, by Porter, in the court of the arches of the Bishop of Canterbury in London. And the case was, that the Archbishop of Canterbury hath a peculiar jurisdiction of fourteen parishes, called a deanry, exempted from the authority of the Bishop of London, whereof the parish of St. Mary de Arcubus is the chief: and the court is called the Arches, because the court is holden there; and a great question was moved, if in the said court of Arches holden in London within his peculiar, he might cite any dwelling in Essex for subtraction of tithes growing in Essex; or if he be prohibited by the statute of the twenty-third year of King Henry the eighth, c. 9. And after that the matter was well debated as well by counsel at the bar, as by Dr. Ferrard, Dr. James, and other civilians in open court; and lastly, by all the Justices of the Common Pleas, a prohibition was granted to the court of Arches. And in this case divers points were resolved by the court.

See the Proem
to the Codex 20,
21.
2 Co. 44, 45, &c.
5 Co. 9, 16, 20.
12 Co. 63.
11 Co. 25.
12 Co. 63.
Post. 14, 15, &c.
• 5 Co. 23.

1. That all acts of Parliament, made by the King, Lords and Commons of Parliament, are parcel of the laws of England, and therefore shall be expounded by the Judges of the laws of England, and not by the civilians and canonists, although the acts concern ecclesiastical and spiritual jurisdiction; and therefore the act of * 2 H. 4 cap. 15. by which in effect it is enacted, *quod nullus teneat, doceat, informet, &c. clam, vel publicè aliquam nefandam opinionem contrariam fidei catholicæ seu determinationi ecclesiæ sacrosanctæ, nec de hujusmodi secta, et nefandis doctrinis conventiculas faciat*: and that in such cases the diocesan might arrest and imprison such offender, &c. And in 10 Hen. 7. the Bishop of London commanded one to be imprisoned, because that the plaintiff said, that he

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he ought not to pay his tithes to his Curate; and the party so imprisoned brought an action of false imprisonment against those who arrested him by the commandment of the Bishop; and there the matter is well argued, what words are within the said statute, and what without the statute: so upon the same statute it was resolved in 5 E. 4. in Keyfar's case in the * King's Bench, which you may see in my book of Precedents: and so the statutes of *Articuli cleri, de prohibitionem regia; de circumspēte agatis*, of 2 E. 6. cap. 13. and all other acts of Parliament concerning spiritual causes, have always been expounded by the Judges of the common law; as it was adjudged in Wood's case, Pasch. 29 Eliz. in my notes fol. 22. So the statute of 21 H. 8. cap. 13. hath been expounded by the Judges of the realm concerning pluralities, and the having of two benefices: canon laws and dispensations, see 7 Eliz. Dyer 233. The King's courts shall adjudge of dispensations and commendams: see also 17 Eliz. Dyer 251. 14 Eliz. Dyer 312. 15 Eliz. Dyer 327. 18 Eliz. Dyer 352, & 347. 22 Eliz. Dyer 377. Construction of the statute, cap. 12. Smith's case, concerning subscription which is a mere spiritual thing. Also it appeareth by 32 Eliz. Dyer 377. That for want of subscription the church was always void by the said act of 23 El. and yet the civilians say, that there ought to be a sentence declaratory, although that the act (expresly) maketh it void.

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1, 2 Co. 44, 45
&c.

5 Co. 9.
11 Co. 10, 14,
16.

Stat. 23 El. c.

1, 2.
See Watson's
Clergyman, 11,
50, & 152.
4 Inst. 323, 324.

2. It was resolved by Coke, Chief Justice, Warburton, Daniel, and Foster, Justices, that the Archbishop of Canterbury is restrained by the act of 23 H. 8. cap. 9. to cite any one out of his own diocese, or his peculiar jurisdiction, although that he holdeth his court of Arches within London. And first it was objected,

That the title of the act is, "an act that no person shall be cited out of the diocese where he or she dwelleth, except in certain cases:" And here the Archbishop doth not cite the said party dwelling in Essex, out of the diocese of London, for he holdeth his court of Arches within London, (and Essex is in the diocese of London.)

2. The preamble of the act is, "where a great number of the King's subjects dwelling in divers dioceses," &c. And here he doth not dwell in divers dioceses.

3. "Far out of the diocese where such men, &c. dwell," and here he doth not dwell far out, &c.

4. The body of the act is, "No manner of person shall be cited before any Ordinary, &c. out of the diocese or peculiar jurisdiction where the person shall be inhabiting," &c. And here he was not cited out of the diocese of London.

See Wefenbeck's
Oeconomies,
fol. 264.
Calepine in
verbo.

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don. To all which it was answered and resolved, that the same was prohibited by the said act for divers causes.

1. As to all the said objections, one answer makes an end of them all: for *diocesis dicitur distinctio, vel divisio, sive gubernatio, quæ divisa, et diversa est ab ecclesia alterius episcopatus, et commissæ est gubernatio in unius*; and is derived *a di quod est duo, et ocesis, sedes vel separatio. quia separat duas jurisdictiones*: so diocese signifies the jurisdiction of one Ordinary separated and divided from others: and because the Archbishop of Canterbury hath a peculiar jurisdiction in London, exempt out of the diocese or jurisdiction of the Ordinary or Bishop of London: for that cause it is fitly said, in the title, preamble, and body of the act, that when the Archbishop sitting in his exempt peculiar in London, cites one dwelling in Essex, he cites him out of the diocese or jurisdiction of the Bishop of London, *ergo* he is cited out of the diocese: and in the clause of the penalty of ten pounds, it is said, out of the diocese or other jurisdiction where the party dwelleth, which agreeth with the signification of diocese before. And as to the words "far off," &c. they were put in the preamble, to shew the great mischief which was before the act: as the statute of 32 Hen. 8. c. 33 in the preamble, it is disseisin with strength, and the body * of the act saith, "such disseisor," yet the same extendeth to all disseisors, but disseisin with force was the greatest mischief, as it is holden in 4 & 5 Eliz. Dyer 219. So the preamble of the statute of Westm. 2. cap. 5. is, heirs in ward, and the body of the act is, *hujusmodi præsentia*, as it is adjudged in 44 E. 3. 18. that an infant who hath an advowson by descent, and is out of ward, shall be within the remedy of the said act, but the frauds of the guardians was the greater mischief. So the preamble of the act of 21 H. 8. cap. 15. which gives falsifying of recoveries, recites in the preamble, that whereas divers lessees have paid divers great incomes, &c. "Be it enacted, that all such termors," &c. and yet the same extends to all termors; and yet all these cases are stronger than the case at bar, for there, that word (*such*) in the body of the act referreth the same to the preamble, which is not in our case.

2. The body of the act is, "no manner of person shall be henceforth cited before any Ordinary, &c. out of the diocese of peculiar jurisdiction where the person shall be dwelling:" and if he shall not be cited out of the peculiar before any Ordinary, *a fortiori*, the court of Arches which sits in a peculiar, shall not cite others out of another diocese:

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cese: and these words, "out of the diocese," are to be meant out of the diocese or jurisdiction of the Ordinary, where he dwelleth; but the exempt peculiar of the Archbishop is out of the jurisdiction of the Bishop of London, as St. Martin's, and other places in London, are not part of London, although they were within the circumference of it. *Vide* 4 E. 4. 17. 20 E. 4. 8, &c.

3. It is to be observed, that the preamble reciting the great mischief, recites expressly, "that the subjects were called by "compulsory process to appear in the Arches, Audience, "and other high courts of the archbishoprics of this realm;" so as the intention of the said act was to reduce the Archbishop to his proper diocese or peculiar jurisdiction, unless it were in five cases.

1. For any spiritual offence or cause committed or omitted contrary to the right and duty by the Bishop, &c. which word (*omitted*) proves that there ought to be a default in the Ordinary.

2. Except it be in case of appeal, and other lawful cause, wherein the party shall find himself grieved by the Ordinary after the matter or cause there first begun; *ergo* the same ought to be first begun before the Ordinary.

3. In case that the Bishop of the diocese, or other immediate Judge or Ordinary dare not, or will not convent the party to be sued before him; where the Ordinary is called the immediate Judge, as in truth he is; and the Archbishop, unless it be in his own diocese (these special cases excepted) mediate Judge, *scil.* by appeal, &c.

4. Or in case that the Bishop of the diocese, or the Judge of the place within whose jurisdiction, or before whom the suit by this act should be begun and prosecuted, be party directly or indirectly to the matter or cause of the same suit; which clause in express words is a full exposition of the body of the act, *scil.* that every suit (other than those which are expressed) ought to be begun and prosecuted, before the Bishop of the diocese, or other Judge of the same place.

5. In case that any Bishop, or any inferior Judge, having under him jurisdiction, &c. made request or instance to the Archbishop, Bishop, or other inferior Ordinary or Judge, and that to be done in cases only where the law civil or canon doth affirm, &c. By which it fully appeareth, that the act intendeth, that every Ordinary and ecclesiastical Judge, should have the conusance of causes within their jurisdiction, without any concurrent authority or suit by way of prevention: and by this, the subject hath great benefit as well by saving of travel and charges to have Justice in his place of habitation, as to

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be judged where he and the matter is best known; as also that he shall have as many appeals as his adversary in the highest court at the first. Also there are two provisos which explain it also, *scil.* "that it shall be lawful to every Archbishop to cite any person inhabiting in any Bishop's diocese within his province, for matter of heresy;" (which were a vain proviso, if the act did not extend to the Archbishop: but by that special proviso for heresy, it appeareth, that, for all causes not excepted, it is prohibited by the act) then the words of the proviso go further; "if the Bishop or other Ordinary immediately hereunto consent, or if the same Bishop or other immediate Ordinary or Judge do not his duty in punishment of the same;" which words *immediately* and *immediate* expound the intent of the makers of the act.

2. There is a saving for the Archbishop, the calling any person out of the diocese where he shall be dwelling, to the probate of any testament; which proviso should be also in vain, if the Archbishop, notwithstanding that act, should have concurrent authority with every Ordinary through his whole province: wherefore it was concluded, that the Archbishop out of his diocese, unless in the cases excepted, is prohibited by the act of 23 H. 8. to cite any man out of any other diocese. And in truth the act of 23 H. 8. is but a law declaratory of the ancient canons, and of the true exposition of them: and that appeareth by the canon, *Cap. Romana in sexto de appellationibus*, and *Cap. de competenti in sexto*. And the said act is so expounded by all the clergy of England, at a convocation in London, *anno 1 Jac. Regis 1603. Canon 94.* where it is decreed, ordained, and declared, that none should be cited to the Arches or Audience, but the inhabitants within the Archbishop's diocese, or peculiar, other than in such particular cases only as are expressly excepted and reserved in and by a statute, *anno 23 H. 8 cap. 9.* And the King by letters patent under the great seal hath given his royal assent to this amongst others, from time to time to be observed, fulfilled, and kept, as well by the Archbishop of Canterbury, the Bishops and their successors, and the rest of the whole clergy of the province of Canterbury, in their several callings, offices, functions, ministeries, degrees, and administrations; as also by all and every Dean of the Arches, and other Judge of the said Archbishop's courts, Guardians of spiritualties, Chancellors, &c. So the same is also expressly confirmed under the great seal. And although the Archbishoprick of Canterbury was then void, yet the Guardian of the spiritualties was there, and the Arch-

The act of 23 H. 8. is a declaration of the old canon law. Gibbon's Cod. 1046, 1050.

Canon 1 Jac. at the synod at London. Vi. Lindwood de excusationibus, 200. Lit. m. 5. & pag. 2. L. a.

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Archbishop of Canterbury that now is, and then Bishop of London, was by letters patent, President of the said Council in the place of the Archbishop then deceased: and the King gave his royal assent to the same, and the said canon is of as full force as if the said late Archbishop of Canterbury had been then alive. And whereas it is said in the preamble of the act; "in the Arches, Audience, and other high courts of the Archbishops of this realm;" it is to be known, that the Archbishops of this realm before that act, had power legatine from the Pope, by which they pretended to have not only super-eminent authority over all, but concurrent authority with every Ordinary in his diocese, not as Archbishop of Canterbury, &c. but by his power and * authority legatine: for *sunt tria genera legatorum*. 1. *Quidam de latere dom' Papæ mittuntur ut Cardinales quos appellant fratres*. 2. *Alii sunt dativi, & non de latere, qui simpliciter in legatione mittuntur, &c.* 3. *Sunt nati, sive nativi, qui suarum ecclesiarum prætextu legatione fungantur, et tales sunt quatuor, scil. Archiepiscopus Cant' Eboracensis, Remanensis, et Pisanis*. So as before that act, the Archbishop of Canterbury, was *legatus natus*, and by force of his authority legatine usurped against the canons upon all the Ordinaries in his precinct, and by colour thereof claimed concurrent authority with them, which although they held in the courts of the Archbishop, the same was remedied by the act of 23 H. 8. cap. 9. and all that which he usurped before, was not as he was Archbishop, for as to that he was restrained by the canons, but as he was *legatus natus*, which authority is now taken away and abolished utterly.

Archbishops were *legati nati*, and had legatine power, which is now abolished, Vid. Linwood.

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Lastly, if the said act of 23 H. 8. cap. 9. should not be so expounded, then the act which is principally made (as it appeareth by the preamble against the courts of the archbishopricks) should be as to them illusory; for if the Bishop of Canterbury, in respect of his exempt peculiar in London, may draw to him all the diocese in London; so might he at Newington, which is a peculiar in Winchester diocese, draw to him the whole diocese of Winchester; and at Totteridge near Barnet, the whole diocese of Lincoln, and so of the like.

Vid. lib. Arch. Cant. p. 39. that the Archbishop of Cant. hath a peculiar in many dioceses. Gibb. Cod. 417, & 1050.

3. It was resolved, that when any Judges are prohibited by any act of Parliament, that if they do proceed against the act, there a prohibition lieth. As against the Steward and Marshal of the Household. *Quod Seneschallus & Marischallus non teneant placit' de libero tenem' de debito, de conventionem, &c.* So in the statute of *Articuli super Chartas*, cap. 3. *Register*, fol. 185. *inter brevia super statuta*. So against the Constable of the castle of Dover:

Q 3

quod

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quod non tangit custodiam castri. So to Justices of Assise upon the statute *Quod inquisitiones quæ sunt magnæ actionis non capiantur in patria.*

Vid. Pasf. 42 El. Rot. 139.

Rudd's case, a prohibition for citing out of the diocese.

Tr. 44 El. rot. 1073. the like in an information upon the statute against Zachary Babington.

Vid. If any one in the spiritual court appeals contrary to the statute of 24 H. 8. c. 12. although the matter be merely spiritual, a prohibition lieth. So upon the statute of 2 H. 5. cap. 2.

Also to the Treasurer and Barons of the Exchequer, upon the statute *De Articulis super Chartas*, cap. 4. The statute of Rutland, cap. ultimo. *Quod communia placita non teneantur in Scaccario.* All which and many more, you may see in the Register *inter brevia super statuta.* See F. N. B. 45 & 56, &c. 17 H. 6. 54. vide 13 E. 3. tit. Prohibition: a prohibition to the Chancellor, and diversity of courts in the title of Chancery. So against all ecclesiastical Judges upon the statute of 2 H. 5. cap. 3. If the Judges there will not give or deliver to the party a copy of the libel, although that the matter be merely ecclesiastical: and therewith agreeth 4 E. 4. 37. and F. N. B. 43. e. So the case upon the statute of 2 H. 5. cap. 15. If the ecclesiastical Judges in case of heresy, and other matters of mere spirituality do not proceed according to the intention of the same statute; as it appeareth by the precedent in 5 E. 4. Keyson's case, 10 H. 7. 17. See the opinion of Passon, 9 H. 6. 3. A man excommunicated by the Bishop of London, for a crime done in another diocese, shall not be grieved thereby; so as the common law takes notice of the canons, in such case, as *coram non judicè.* And although the statute of 23 H. 8. inflicts a penalty, yet a prohibition lieth, for the inflicting of the penalty doth not take away the prohibition of the law: and therefore, *Cap.* which inflicts punishment, if the Sheriff doth put his name unto the return; yet the same is error if he doth not put to his name. See 35 H. 6. 6. when any thing is prohibited by a statute, if the party be convicted, he shall be fined for * the contempt to the law; and 19 H. 6. 4. agrees in maintenance: and if every person should be put to his action upon the statute, the same would be cause of suits and vexation, and the shortest and more easy is to have a prohibition: see the statute of 21 H. 8. cap. 6. of mortuaries, by which it is enacted, that no Parson, Vicar, Curate, &c. demand any mortuary but in such manner as is mentioned in the act, upon pain of forfeiture of so much in value as they take, more than is limited by the act, and forty shillings over to the party grieved. Yet it appeareth by Doctor and Student, lib. 2. cap. 15. fol. 105. that if the Parson, &c. sueth for mortuaries otherwise than the act appointeth, that a prohibition lieth; yet there is a penalty added, which is an authority expressly in the point: and the case at bar is a more strong case, and that for three reasons.

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See 2 H. 4. 10. by Hawkeford, and so affirmed by the court, when one who hath not authority, holdeth plea in spiritual things, whereof the jurisdiction doth not belong to him, yet no consultation shall be granted, because a consultation shall not be granted to one that hath not power, &c.

I. It

Part XIII. EDWARDS's Case.

1. It was made an affirmance of the canon law.
2. It was made for the ease of the people and subjects;
- and 3. For the maintenance of the jurisdiction of the Ordinary, so as the subjects have benefit by the act; and therefore although that the King may dispense with the penalty, yet the subject grieved shall have a prohibition. And the rule of the court was, *fiat prohibitio curiæ Cantuar' de Arcub' inter partes prædict' per curiam*. And Sherley, and Harris, jun. Serjeants at law, were of counsel in the case.

EDWARDS's Case.

3 Mich. 6 Jacobi 1.

THE High Commissioners in clauses ecclesiastical objected divers articles in English, against Thomas Edwards dwelling in the city of Exeter.

High commission.

Post. 47.

12 Co. 19, 47, 76.

See Gibson's 1 Codex 36, 50, 54, 56, 58, &c. 219, 309, 396.

1. That Mr. John Walton hath been many years trained up in learning in the university of Oxford, and there worthily admitted to several degrees of schools, and deservedly took upon him the degree of Doctor of Physic.

2. That he was a reverend, and well practised man in the art of physic.

3. That you the said Thomas Edwards said to him, "you are no graduate," &c.

4. That you knowing the premises, notwithstanding you the said Edwards, &c. of purpose to disgrace the said Dr. Walton, and to blemish his reputation, learning, and skill, with infamy and reproach, did against the rules of charity write and send to the said Mr. Doctor Walton, a lewd and ungodly, and uncharitable letter, and therein taxed him of want of civility and honesty, and want of skill and judgment in his art and profession, &c. And you so far exceeded in your immoderate and uncivil letter, that you told him therein in plain terms, "he may be crowned for an ass," as if he had no manner of skill in his profession, and were altogether unworthily admitted to the said degrees, and therein you purposely and advisedly taxed the whole university of rashness and indiscretion for admitting him to that degree without sufficiency and desert.

Q 4

5. And

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5. And further to disgrace the said Mr. Doctor Walton, in the said university, did publish a copy of the said letter to Sir William Courtney, and others, and in your letter was contained, *sipſilam lichenen mentegram*, take that for your inheritance, and thank God you had a good father: and did not you thereby covertly * mean and imply, that the father of the said Dr. Walton (being late Bishop of Exeter, and a reverend Prelate of this land) was subject to the diseases of the French-pox and leprosy, to the dislike of the dignity and calling of Bishops.

6. That in another letter you sent to Mr. Doctor Maders, Doctor of Physic, you named Mr. Dr. Walton, and made a horn in your letter: and we require you upon your oath to set down, whether you meant not that they were both cuck-olds, and what other meaning you had.

7. You knowing that Dr. Walton was one of the high commission in the diocese of Exeter, and having obtained a sentence against him in the Star-chamber, for contriving and publishing of a libel, did triumphingly say, that you had gotten on the hip a Commissioner for causes ecclesiastical in the diocese of Exeter, which you did to vilify and disgrace him, and in him the whole commission ecclesiastical in those parts.

Lastly, that after the letter missive sent unto you, you said arrogantly, "that you cared not for any thing that this court can do unto you, nor for their censure, for that you can remove this matter at your pleasure."

And this term it was moved to have a prohibition in this this case. And the matter was well argued: and at last it was resolved by Coke Chief Justice, Warburton, Daniel, and Foster Justices, that the first six articles were merely temporal, concerning Doctor Walton in his profession of Physic, and so touched only the temporal person, and a temporal matter, and in truth, it is in the nature of an action upon the case for scandal in his profession of physic: and yet the Commissioners themselves do proceed in the same *ex officio*. And it was resolved, that as for them, a prohibition doth lie for divers causes.

See Book of Entries 444, &

447. Non est juri consentaneum quod quis super iis quorum cognitio ad nos pertinet in curia christianitatis trahatur in placita.

Vide statute circumspecte agatis, anno 13 E. 1. Episcopus teneat placita in curia christianitatis de his que sunt mere spiritualia. Et vide Lindwood, fol. 70. Lit. m. dicuntur mere spiritualia quia non habent mixturam temporalem. Vide 22 E. 4. l. Consultat. Vide 22 E.

4. the Abbot of Sion's case.

calling

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calling the Doctor cuckold, as it was objected in the seventh article: and it was said that the High Commissioners "ought to incur the danger of *Premunire*."

2. It was resolved, that the ecclesiastical Judge cannot examine any man upon his oath, upon the intention and thought of his heart, for *cogitationis poenam nemo meret*. And in cases where a man is to be examined upon his oath, he ought to be examined upon acts or words, and not of the intention or thought of his heart; and if every man should be examined upon his oath, what opinion he holdeth concerning any point of religion, he is not bound to answer the same; for in time of danger, *quis modo tutus erit*, if every one should be examined of his thoughts. And so long as a man doth not offend neither in act nor in word any law established, there is no reason that he should be examined upon his thought or cogitation: for as it hath been said in the proverb, *thought is free*; and therefore for the sixth and seventh articles, they were resolved as well for the matter as for the form, in offering to examine the defendant upon his oath, of his intention and meaning, to be such, to which the defendant was not to be compelled to answer: *ergo*, it was resolved, that as to the article, he might justify the same, because as it appeareth upon his own shewing, that * the Doctor was sentenced in the Star-chamber: also the libel is matter mere temporal, and if it were merely spiritual, such a defamation is not examinable before the High Commissioners. Page [11]

As to the last article, it appeareth now by the judgment of this court, that he might well justify the said words: also the High Commissioners shall not have consueance of any scandal to themselves for that they are parties; and such scandal is punishable by the common law, as it was resolved in Hale's case, which see in the book of the Lord Dyer's Reports, and see in my book of precedents, the copy of the indictment of Hales, for scandall'ing of the ecclesiastical Commissioners.

Note, the Bishop of Winchester being visitor of the school of Winchester of the foundation of Wickham Bishop of Winchester; and the Bishop of Canterbury, and other his colleagues, *anno 5 Car.* cited the Usher of the said school, by force of the said commission to appear before them, and proceeded there against him, for which they incurred the danger of a *Præmunire*. And so did the Bishop of Canterbury and his colleagues, by force of a high commission to them directed, cite one Humphry Frank Master of Arts, and Schoolmaster of the school of Sevenock,

(of

Judex non potest injuriam sibi datam punire.
Vid. the stat. of 23 H. 8. cap. 9.

TAYLOR and SHOILE's Case. Part XIII.

(of the foundation of Sir William Sevenock, in the time of King Henry the sixth) to appear before the High Commissioners at Lambeth, the sixth day of December last past, which citation was subscribed by Sir John Bennet, Doctor of Laws, Doctor James, and Dr. Hickman, three of the High Commissioners; and Sir Christopher Perkins procured the said citation to be made, and when the said Frank appeared, the Archbishop being associated with Sir Christopher Perkins, and Dr. Abbot Dean of Winchester, made an order concerning the said school, (*scil*) that the said Frank shall continue in the same school until the Anunciation, that he should have twenty pounds paid to him by Sir Ralph Bosvile, Knight, who it seems was never cited; (but *quare*, if he was not plaintiff?)

TAYLOR and SHOILE's Case.

4 Mich. 6 Jac. 1.

Brewer, a trade within 5 Eliz. Indictments, &c. on the said stat. See 1 Salk. 370, 373, 382. 5 Mod. 180. 2 Roll. Abr. 81. pl. 6. Cumb. 179 212. 254, &c. 288.

TAYLOR informed upon the statute 5 Eliz. cap. 4. *tam pro domino Reg' quam pro seipso* in the Exchequer, that the defendant had exercised the art and mystery of a Brewer, &c. and averred that Shoile the defendant did not use or exercise the art or mystery of a Brewer, at the time of the making the act, nor had been apprentice by seven years at least, according to the said act, &c. The defendant did demur in law upon the information, and judgment was given against him by the Barons of the Exchequer. And now in this term, upon a writ of error, the matter was argued at Serjeant's Inn, before the two Chief Justices, and two matters were moved; the one, that a Brewer is not within the said branch of the said act: for the words are, "that it shall not be lawful to any person or persons, other than such as now lawfully use or exercise any art or mystery, or manual occupation, to set up, use, or exercise any art, mystery, or manual occupation, except he shall have been brought up therein seven years at the least, as an apprentice." And it was said, that the trade of a Brewer is not any art, mystery, or manual occupation within the said branch, because the same is easily and presently learned, and he * needs not to have

Part XIII. TAYLOR and SHOILE's Case.

have seven years apprenticeship to be instructed in the same, for every housewife in the country can do the same: and the act of Henry the eighth is, that a Brewer is not a handicraft artificer.

2. It was moved, that the said averment was not sufficient, for the averment ought to be as general as the exception in the statute is, (*scil.*) that the defendant did not use any art, mystery, or occupation at the time of the making the same act; for by this pretence, if any art, &c. then as a Taylor, Carpenter, &c. he may now exercise any other art whatsoever.

As unto the first, it was resolved, that the trade of a Brewer, (*scil.*) to hold a common brewhouse, to sell beer or ale to another, is an art or mystery within the said act; for in the beginning of the act, it is enacted, that no person shall be retained for less time than a whole year in any of the services, crafts, mysteries, or arts of Cloathing, &c. Bakers, Brewers, &c. Cooks, &c. So as by the judgment of the same Parliament, the trade of a Brewer is an art and mystery; which words are in the said branch upon which the said information is grounded. Also because that every housewife brews for her private use; so also she bakes, and dresseth meat: and yet none can hold a common bakehouse, or a cook's-shop to sell to others, unless that he hath been an apprentice, &c. for they are expressly named also in the act as arts and mysteries: and the act of 22 H. 8. cap. 13. is explained, that a Brewer, Baker, Surgeon, and Scrivener alien, are not handicrafts mentioned within certain penal laws: but the same doth not prove, but that they are arts or mysteries, for art or mystery is more general than handicraft, for the same is restrained to manufactures.

As to the second point, it was resolved, that the intention of the act was, that none should take upon him any art, but he who hath skill or knowledge in the same: and therefore the statute intendeth, that he who used any art or mystery at the time of the act, might use the same art or mystery: for *quod quisque norit in hoc se exerceat*. And the words of the act are, "as now do lawfully use," &c. And it was said, that it was very necessary, that Brewers should have knowledge and skill in brewing good and wholesome beer and ale, for that the same doth greatly conduce to men's health: and so the first judgment was affirmed.

(5) The Case of MODUS DECIMANDI.

Mich. 6 Jac. 1.

In the Common Pleas.

De non Deci-
mando silvæ cæ-
dunt.Vide post. 23,
37, 58, &c.
12 Co. 63, 64.
Watson's Cler-
gyman 546,
547, &c.
Farrell. 137.

Ibid 515, 516.

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Custom de non
Decimando,
where good or
not.See Watson's
Clergyman, 502,
503, 506, 526,
544, &c.
568, &c.Selden of
Tithes, ch. 14.
sect. 2, 3, &c.

SHERLEY, Serjeant, moved to have a prohibition, be-
cause that a person sued to have tithes of *silva cædua* un-
der twenty years growth in the Weild of Kent; where by the
custom of it, which is a great part of the country, tithes of
any wood was never paid. And if such a custom *in non Deci-*
mando for all lay people within the said Weild; were lawful
or not, was the question; and to have a prohibition it was
said, that although one particular man shall not prescribe *in*
non Decimando, yet such a general custom within a great
country might well be, as in 43 E. 3. 32. and 45 E. 3.
Custom 15. It was presented in the King's Bench, that an
Abbot had purchased tenements after the statute, &c. And
the Abbot came and said, that he was lord of the * town,
&c. And the custom of the town was, that when the
tenant cesseth for two years, that the lord might enter until
agreement be made for the arrearages; and that he who held
these tenements was his tenant, and cesseth for two years, and
he entered: and the rule of the court is, because it was an
usage only in that town, and not in the towns, that is, in
the country adjoining, he was put to answer. So as by the
same it appeareth, that a custom was not good in a particu-
lar town, which perhaps might be good and of force in a
country, &c. See 40 Aff. 21, and 27. 39 E. 3. 2. A cus-
tom within a town, that an infant, &c. might alien, is not
good; but yet such a custom within Kent hath oftentimes
been adjudged to be good. See 7 H. 6. 26. b. 16 E. 2. Pre-
scription 53. Dyer 365. 22 H. 6. 14. 21 E. 4. 15. and 45
Aff. 8. See Doctor and Student, lib. 2.c. 55. A particular
country may prescribe to pay no tithes for corn, hay, and
other things, but that is with this caution, so as the Mi-
nister hath sufficient portion besides to maintain him, to
celebrate divine service: and fol. 172. it is holden, that
where tithes have not been paid of underwoods under
twenty years growth, that no tithes shall be paid for the
same,

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same, because that they do not renew nor increase from year to year, so as they are not due to the Parson but by custom.* And he saith, fol. 174. that such a custom of a whole country, that no tithes of a lordship shall be paid, is good; and it is to be observed, that in all libels for tithes of woods, they allege a prescription to have tithes of them: but the court would advise, whether such a custom for a town or country should be good: but in ancient times, the parishioners have given or procured to the Parson a wood or other lands, &c. to have and to hold to him and his successors in satisfaction of all tithes of wood in the same parish; and the Parson is now seised of the same wood, and that without question is a good discharge of his tithes; and that in such case, if he sueth for tithes of wood, a prohibition lieth: and for that it hath been said now of late, that such opinions were new and without any antiquity, unto the great prejudice of the church: I will cite you an ancient judgment many years past, Mich. 25 H. 3. Wilts. Rot. 5. before the King at Westminster. Sampson Foliet brought an attaint upon a prohibition, against Thomas Parson of Swynden, because he sued him in the spiritual court for a lay fee of the said Sampson, in Draycot, contrary to the King's prohibition, &c. The defendant pleaded, *quod coram iudicibus delegatis petiit de eodem decimas scæni de quodam prato ipsius Sampsonis in Walcot unde est in possessione per sententiam iudicium suorum, & fuit, antequam prohibitio dom' Regis ad eum pervenerit, et quod pratum prædict' est in Walcot unde ipse est persona, et non in Draycot*: to which the said Sampson replied and said, *quod antecessores sui antiquitus dederunt duas acras prati ecclesiæ de Draycot pro decimis scæni quam prædict' Thomas modo petit in eodem prato, quas quidem duas acras prati eadem ecclesia adhuc habet, et semper hucusque habuit, unde videtur ei quoad illud quod prædict' Thomas ultra petit, est de laico feodo suo, et dicit quod pratum illud in quo idem Thomas petit decimas est in Draycot sicut breve dicit, & non in Walcot, & de hoc ponit se super patriam*: and the jury found, *quod prædict' T. persona de Swyndon secutus fuit placita in curiâ christianitatis de laico feodo prædict' Sampsonis contra prohibitionem dom' Regis, petendo ab ipso decimas scæni de quodam prato ipsius Sampsonis in Draycot unde antecessores sui antiquitus dederunt ecclesiæ de Draycot duas acras prati pro decima * scæni quam prædict' Thomas modo petit, et quas eadem ecclesia adhuc habet & semper hucusque habuit, &c. Et quod pratum prædict' in quo idem Thomas petiit decimas est in Draycot, et non in Walcot,*

Note no tithes are due for wood of common right.

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Walcot, &c. Ideo consideratum est quod prædict' Thomas sit inde in misericord' & reddat præd' Samsoni 20 marcas quas versus eum pro damnis, &c. Which ancient judgment I have recited at large, because that the same agrees with the rule and reason of the law continued until this day: for judgments or precedents in the time of Ed. 2. E. 1. H. 3. John, R. 1. and more ancient are not authorities or precedents to be now followed, unless that they concur and agree with the law, and common experience and practice at this day; for many acts of Parliaments (and some of them not extant) have changed the ancient laws in divers cases: and desuetude hath antiquated, and time and custom hath taken away divers others; and so as the rule is good, *quod judiciis posterioribus fides est adhibenda; et a communi observantia non est recedendum.* There are two points adjudged by the said record.

Vide post. 15,
16, 46.
Discharge of
tithes to be tried
at common law.
See and note the
Introduction to
Gibson's Codex
20, 21.
Antea 4, &c. ib.
2 Co. 38, 44, to
48.
4 Co. 74.
5 Co. 9, 13, 15,
&c.

I. That satisfaction may be given in discharge of payment of tithes; and if the successor of the Parson enjoyeth the thing given in satisfaction of the tithes, and sueth for tithes in kind, the defendant shall have a prohibition, because that he chargeth his lay fee with tithes, which is discharged of them. By which it appeareth that tithes may be discharged, and altogether taken away and extinct: and herewith agreeth the Register which is the most ancient book of the law, f. 38. *Rex, &c. tali judici, &c. salutem. Monstravit nobis A. tenens quandam partem manerii de D. quod licet E. nuper dominus manerii præd' per quoddam scriptum indentat' dedisset & concessisset F. nuper personæ ecclesiæ de D. quatuor acras terræ cum pertin' in eodem manerio habend' & tenend' eidem F. & successoribus suis personis ecclesiæ præd' in perpetuum. Et idem F. per præd' scriptum de assensu & voluntate Episcopi Lincoln' diocesisani loci præd' & J. tunc patroni ecclesiæ præd' concessit pro se et successoribus suis quod idem E. hæredes et assignati sui essent quieti de decimis vitulorum, &c. in manerio præd' pro præd' quatuor acris sibi datis, &c. Et tamen nunc persona ecclesiæ præd' tenens præd' quatuor acras terræ præd' A. assignat' præd' E. super decimam hujusmodi vitulorum, &c. in eodem manerio, sibi præsentand' trahit in placitum, coram, &c. in curiâ christianitatis, &c. Et quia discussio hujusmodi donationis de laico feodo in regno nostro in curiâ nostrâ, & non alibi tractari & fieri debet, vobis prohibemus, quod placitum aliquod super laicum feodum in regno nostro non teneatis in curiâ christianitatis, nec quicquam in hac parte quod in enervationem dicti scripti aut donationis, & concessionis præd' quæ in curiâ nostrâ & non alibi tractari sicut præd' est decernere poterit attentetis, sive attentim faciatis quovismodo: by which also*

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also it appeareth, that tithes may be discharged, and that the matter of discharge ought to be determined by the common law, and not in the spiritual court: and it is to be observed, that neither in the said judgment, nor in the Register any averment is taken of the value of the thing given in satisfaction of the tithes. Also by the act of *Circumspecte agatis*, made 13 E. 1. it is said, *si rector petat versus parochianos oblationes, et decimas debitas, seu consuetas, &c.* which proves that there are tithes due in kind, and other tithes due by custom, as a *Modus decimandi*, &c. And yet it is resolved in 19 E. 3. Jurisdiction 28. that the ordinance of *Circumspecte agatis* is not a statute †; and that the Prelates made the same *sans assent*, &c. and yet then the Prelates acknowledged, * that there were tithes due by custom, which is a *Modus decimandi*. By which it appeareth also, that tithes by custom may be altered into another thing ‖: so where a man grants a parcel of his manor to a Parson in fee to be quit of tithes, and makes an indenture, and the Parson with the assent of the Ordinary (without the Patron) grants to him that he shall be quit of tithes of his manor for that parcel of land: afterwards if he or his assignee be sued in the spiritual court for tithes of his manor, he or his assignee shall have a prohibition upon that deed. And if that deed was made before time of memory, and he hath so continued to be quit of tithes, he shall have a prohibition upon that deed, if he be sued for the tithes of that manor, or of any parcel of the same upon that matter shewed. See 8 E. 4. 14. F. N. B. 41. G. Vide 3. E. 3. 17. 16 E. 3. 1. Annuity 24. 40 E. 3. 3. b. and F. N. B. 152. And therefore, if the lord of a manor hath always holden his manor discharged of tithes, and the Parson had before time of memory, or in ancient times, divers lands in the same parish, of the gift of the lord, of which the Parson is seised at this day in fee, in respect of which, the Parson nor any of his predecessors ever had received any tithes of the said manor; if the Parson now sueth for tithes of the manor, the owner of the manor may shew that special matter, and that the Parson and his successors time out of mind have holden those lands, &c. of the gift of one who was lord of the said manor, in full satisfaction of the tithes of the said manor; and the proof that the lord of the manor gave the lands, that tithes should never be paid, at this day, is good evidence to prove the surmise of the prohibition. And so of the like; and 19 E. 3. t. Jurisdiction 28. it is adjudged, that title of prescription, shall be determined in the King's court. and therefore a *Modus*

Averment.
Post. 33.

† See the Dedicat. Pryn's 3. to Papal. Usurp. p. 19. & lib. 1270. and Bohun's Law of Tithes, 308, &c.
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‖ Vide Bohun, ib. 211, 212. & post. 16.

Prescriptions to be adjudged in the King's courts, vide 15, 16.

Modus

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Watson's Clergyman 528.

Ibid. 518, 519, 526, &c. 529.

Ibid. 578, 584, 600.

Ibid. 538, 560, 564, 571, 586, &c. 598, &c. 614, 623, 632, &c.

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See Watson 503, 512, &c. to 558.

Ibid. 546, &c.

Ibid. 526, &c.

Ibid. 502.

modus decimandi which accrueth by custom and prescription shall be sued in the King's court. And it appeareth by the statute of 7 H. 4. c. 6. that the Pope by his bulls discharged divers from payment of tithes, against which the act of Parliament was made; and by stat. 31 H. 8. c. 13. That the possessions of religious persons given to the King, were discharged of payment of tithes in certain cases: and by statute 32 H. 8. c. 7. it is provided, that all and singular persons shall divide, set out, yield and pay all and singular tithes and offerings aforesaid, according to the lawful customs and usages of the parishes and places where such tithes or duties shall come, or immediately rise or be due: provided always, and be it enacted, "that no person or persons shall be sued or otherwise compelled to pay any manner of tithes, for any manors, lands, tenements, or hereditaments, which by the laws or statutes of this realm are discharged, or not chargeable with the payment of any such tithes:" and the statute 2 E. 6. c. 13. enacts, that every of the King's subjects shall from henceforth justly and truly, without fraud or guile, divide, set out, &c. all manner of their predial tithes in their proper kind as they shall rise and happen, in such manner and form as hath been of right yielded and paid, within forty years next before the making of this act, or of right or custom ought to be paid. So as it appeareth by this, that tithe is due of right, and by custom: and also in the same act there is a proviso in these words; "provided always and be it enacted, that no person shall be sued, or otherwise compelled to yield, give, or pay any manner of tithes for any manors, lands, tenements, or hereditaments, which by the laws and statutes of this realm, or by any privilege or prescription, are not * chargeable with the payment of any such tithes, or that he be discharged by any composition real:" so as it appeareth by that act, that one may be discharged from the payment of tithes five manner of ways.

1. By the law of the realm, that is, the common law; as tithes shall not be paid of coals, quarries, brick, tiles, &c. F. N. B. 53. and Register 54. nor of the after-pasture of a meadow, &c. nor of rakings, nor of wood to make pales, or mounds, or hedges, &c.

2. By the statutes of the realm: as by the statute of 31 H. 8. c. 13. the statute of 45 E. 3. &c.

3. By the privilege, as those of St. John's of Jerusalem in England; the Cisterians, Templars, &c. as it appeareth by 10 H. 7. 277. Dyer.

4. By prescription, as by *Modus decimandi*, or an annual recompence in satisfaction of them, as appeareth before by the authorities aforesaid.

5. By

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5. By real composition, as appeareth by the said writ cited out of the Register: and so you have one or two examples (for many others which may be added) of these five manners of discharges of tithes. And by them all it appeareth, that a man may be discharged of the payment of tithes, as before it is said: so as now it apparently appeareth by the laws of England, both ancient and modern, that a layman ought to prescribe *in modo decimandi*, but not *in non decimando*; and that in effect agrees with the opinion of Thomas Aquinas in his *Secunda secundæ*, quæst. 86. art. ultimo. For there he saith, *quod in veteri lege præceptum de solutione decimarum partim erat morali inditum ratione naturali quæ dicitur quod iis qui divino cultui ministrant ad salutem totius populi necessariâ victui debent ministrare juxta illud, 1 Cor. 9. Quis militat, &c.* Who goeth to war at his own charges, &c. *Partim autem erat judiciale ex divinâ institutione robur habens, (scilicet) quantum ad determinationem certæ partis.* And all that agrees with our law; and he goeth further, *in tempore vero novæ legis etiam est determinatio partis solvendæ autoritate ecclesiæ* that is, by their canons) *instituta secundum quandam humanitatem, ut scilicet non minus populus novæ legis ministris Novi Testamenti exhibeat, quam populus veteris legis ministris Veteris Testamenti exhibebat, præsertim cum ministri novæ legis sunt majores dignitate, ut probat Apostolus, 2 Cor. 3. Sic ergo patet quod ad solutionem decimarum tenentur homines partim quidem ex jure naturali, quantum ad hoc quod aliqua portio data est ministris ecclesiæ, partim vero ex institutione ecclesiæ quantum ad determinationem decimæ partis.* See Doctor and Student, lib. 2. cap. 56. fol. 164. That the tenth part is not due by the law of God, nor by the law of nature, which he calleth the law of reason: and he citeth John Gerson, who was a Doctor of Divinity, in a treatise which he calleth *regulæ morales (scilicet) solutio decimarum sacerdotibus est jure divino, quatenus inde sustententur, sed quoad partem hanc vel illam assignare aut in alios redditus commutare, positivi juris est.* And afterwards, *non vocatur portio curatis debita propterea decima, eo quod est decima pars, imò est interdum vicesima aut tricesima.* And he holdeth, that a portion is due by the law of nature, which is the law of God, but it appertaineth to the law of man to assign *hanc vel illam portionem*, as necessity requireth for their sustenance. And further he saith, "that tithes may be exchanged into lands, annuity, or

See Selden of
Tithes, c. 14.
sect. 3. lib. 507.
Bohun's Law of
Tithes, 214, 215
&c.

Selden of Tithes
c. 6, 7, 8, &c.
Watson, 431
506, 511

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Vide R. buff.
Tractat. De decimis. Questio
13. an decimæ
telli possunt.
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Canons against
the prerog. sta-
tutes, custom,
or prescription,
are void. See
2 Inst. 599, &c.
post. 47.

Second point.
Limits and
bounds of pa-
rishes, &c. to be
tried by common
law. Vide Farr.
63. Quare Gib-
son's Cod. 239,
&c. 2 Inst. 599.

“rent, which shall be sufficient for the Minister,” &c. And there he saith, that in Italy, and in other the east countries, they pay no tithes, but a certain portion according to the custom, &c. And all this is true, if * not, that tithes be discharged or changed by one of the said five ways: and forasmuch as it appeareth from themselves that the tenth part or value was part of the judicial law only, certainly the same doth not bind any Christian commonwealth, but that the same may be altered by reason of time, place, or other consideration, as it appeareth in all punishments inflicted by the judicial law, they do not now bind any; for felony is now punished by death, &c. which was not so by the judicial law, &c. Also forasmuch as now it is confessed, that the tenth part is now due only *ex institutione ecclesie* that is to say, by their canons, and it appeareth by the statute of 25 H. 8. c. 19. that all canons, &c. made against the prerogative of the King or his laws, statutes, or customs of the realm, are void, and that was but a declaratory law; for no statute or custom of the realm can be taken away or abrogated by any canon, &c. made out or within the realm, but only by act of Parliament; and that well appeareth by 10 H. 7. f. 17. c. 18. that there is a canon or constitution, that no Priest ought to be impleaded at the common law. And there Brian saith, that a grave Doctor of the Law once said unto him, that Priests and Clerks might (notwithstanding) be sued at the common law well enough; for he said, that *Rex est persona mixta*, and is *persona unita cum sacerdotibus statutis ecclesie*. In which case the King might maintain his jurisdiction by prescription; by which it appeareth, that prescription doth prevail against express canons or constitutions, and is not taken away by them, which proves that the statute of 25 H. 8. was but a declaration of the ancient law before: and there is an express prohibition in Numb. 18. *Nihil aliud possidebunt, sed decimarum oblatione contenti quas in usus eorum & necessaria separavi*: which was not part of the moral law, or law of nature, but part of the judicial: and therefore men of the church at this day do possess houses, lands, and tenements, and not tithes only.

The second point which agrees with the law at this day, which was adjudged in the said record of 25 H. 3. is, that the limits and bounds of towns and parishes shall be tried by the common law, and not in the spiritual court; and in this the law hath great reason, for thereupon depends the title of inheritance

Part XIII. The Case of MODUS DECIMANDI.

ritance of the lay-fee, whereof the tithes were demanded for fines, and recoveries are the common assurances of lay inheritances; and if the spiritual court should try the bounds of towns, if they determine that my land lieth in another town than is contained in my fine, recovery, or other assurance, I shall be in danger to lose my inheritance, and therewith agreeeth 39 E. 3. 29. 5 H. 5. 10. 32 E. 4. t. Consultation, 3 E. 4. 12. 19 H. 6. 20. 50 E. 3. 20. and many other precedents until this day. And note, there is a rule in law, that when the right of tithes shall be tried in the spiritual court, and the spiritual court hath jurisdiction thereof, that our courts shall be ousted of the jurisdiction, 35 H. 6. 47. 38 H. 6. 21. 2 E. 4. 15. 22 E. 4. 23. 38 E. 3. 36. 14 H. 7. 17. 13 H. 2. Jurisd. 19. but that is, when debate is between Parson and Vicar, or when all is in one parish; but when they are in several parishes, then this court shall not be ousted of the jurisdiction. See 12 H. 2. tit. Jurisdiction 17. 13 R. 2. ibid. 19. 7 H. 4. 34. 14 H. 4. 17. 38 E. 3. 56. 42 E. 3. 12. And yet there is a canon expressly against this, which see in Linwood *titulo de pœnis* 55. And so folio 227, 228, amongst the canons or constitutions of Boniface, *anno Dom.* 1277. And the causes whereof the Judges of the common law would not permit the ecclesiastical Judges to try *Modum decimandi*, being pleaded in their court is, because that if the recompence * which is to be given to the Parson, in satisfaction of his tithes doth not amount to the value of the tithes in kind, they would overthrow the same: and that also appeareth by Linwood amongst the constitutions *Simonis Mepham, titulo De Decimis, cap. Quoniam propter, fol.* 139. 6. *verbo consuetudines, consuetudo ut non solvantur, aut minus plene solvantur decimæ, non valet; and ibidem secundum alios, quod in decimis realibus, non valet consuetudo ut solvatur minus decima parte, sed in personalibus, &c.*

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Note this difference; although that the parties do admit the jurisdiction of the court, yet upon the pleading,

though the right of the tithes shall come in debate, there this court shall be ousted of the jurisdiction, and the spiritual court shall have jurisdiction. But when the right of tithes cometh in debate, and the spiritual court cannot have jurisdiction or consance of it; as where a layman is plaintiff as farmor, or defendant as servant of the Parson, as a layman farmor cannot sue there, nor he who justifies a servant cannot be sued in trespass; but if the suit be between Parson and Vicar, or Parson and Parson, and other spiritual persons, if the King's court be ousted of the jurisdiction after severance of the ninth part; yet the libel ought to be for subtraction of tithes, for of that they have jurisdiction, and not of tithes severed from the nine parts; for that shall be in case of a Premunire, and it appertaineth to the common law. See 16 H. 2. in the case of mortuary. Vide *Decretalia Sexti, lib. 3. tit. de Decimis, cap. 1. fo. 130. col. 4. Et summa Angelica, fo. 72.*

Note, All this seems the opinion of some civilian: ergo quære.

R 2

And

BARON and BOYS's Case. Part XIII.

No law could bind them, if against the church's interest.

And *ibidem* Lit. M. verbo, integre, faciunt expresse contra opinionem quorundam theologorum, qui dicunt sufficere aliquid dari pro decima. And that is the true reason in both the said cases, *scil. de modo decimandi, et de limitibus parochiarum, &c.* that they would not adjudge according to their own canons; and therefore a prohibition lieth; and therewith agreeth 8 E. 4. 14. and the other books abovesaid, and infinite precedents; and the rather after the statute of 2 E. 6. cap. 13. And also the customs of the realm are part of the laws of the realm, and therefore they shall be tried by the common law, as is aforesaid. See 7 Ed. 6. Dyer 79. and 18 Eliz. Dyer 349. the opinion of all the Justices.

(6) BARON and BOYS's Case.

Mich. 6 Jac. 1.

In the Exchequer.

Stat. 2 E. 6. cap. 14. of Ingrossors.
1 Hawk. c. 80. sect. 1, 2, 3, 5. & sect. 15, 16, 17, &c.

IN the case between Baron and Boys, in an information upon the statute of 5 E. 6. cap. 14. of ingrossors, after verdict it was found for the informer, that the defendant had ingrossed apples against the said act: the Barons of the Exchequer held clearly, that apples were not within the said act, and gave judgment against the informer upon the matter apparent to them, and caused the same to be entered in the margin of the record where the judgment was given; and the informer brought a writ of error in the Exchequer-chamber, and the only question was, whether apples were within the said act? The letter of which is, "that whatsoever person or persons, &c. shall ingross or get into his or their hands, by buying, contracting, or promise, taking (other than by demise, grant, or lease of land, or tithe any corn growing in the fields, or any other corn or grain,

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“ grain, butter, cheese, fish, or other dead victual within
“ the realm of England, to the intent to sell the same again,
“ shall be accepted, &c. an unlawful ingrosser.” And al-
though that the stat. of 2 E. 6. cap. 15. made against sellers
of victual, which for their great gain conspire, &c. number-
eth butchers, brewers, bakers, cooks, coster-mongers, and
fruiterers, as victuallers: yet apples are not dead victuals
within the statute of 5 E. 6. for the buyers and sellers of
corn and other victuals have divers provisoes and qualifica-
tions for them, as it appeareth by the said act, but * coster-
mongers and fruiterers have not any proviso for them: also, Page [19]
always after the said act they have bought apples and other
fruits by ingross, and sold them again, and before this time
no information was exhibited for them, no more than for
plumbs or other fruit, which serveth more for delicacy than for
necessary food. But the statute of 5 E. 6. is to be intended
of things necessary and of common use for the sustenance
of man; and therefore the words are corn, grain, butter,
cheese, or other dead victual; which is as much as to say
victual of like quality, that is, of like necessary and common
use: but the statute of 2 E. 6. cap. 15. made against conspi-
racies to enhance the prices, was done and made by express
words, to extend it to things which are more of pleasure
than of profit: so it was said, that of those fruits a man can-
not be a forestaller within this act of 5 E. 6. for in the same
branch the words are, “ any merchandize, victual, or any
“ other thing.” But this was not resolved by the Justices,
because that the information was conceived upon that branch
of the statute concerning ingrossers.

(7) M E N V I L's Case.

Hil. 27 Eliz.

(Dower.) In the Chancery.

Fine. Dower.
 See 2 Co. 74, 78.
 6 Co. 79.
 7 Co. 38, 40.
 St. 27 H. 8. c.
 10.
 St. 4 H. 7. c. 24.
 St. 18 E. 1. de
 Modo levandi.
 5 Co. 2. Part
 38, 39.
 2 Inst. 511, &c.

HILARY term, the 27th of Eliz. in the Chancery, the case was thus: one Ninian Menvill seised of certain lands in fee, took a wife, and levied a fine of the said lands with proclamations, and afterwards was indicted and outlawed of high treason, and died: the conusees convey the lands to the Queen, who is now seised; the five years pass after the death of the husband: the daughters and heirs of the said Ninian in a writ of error in the King's Bench, reverse the said attainder, Mic. 26 & 27 Eliz. last past; and thereupon the wife sueth to the Queen, (who was seised of the said land as aforesaid) by petition, containing all the special matter, *scil.* the fine with proclamations, and the five years passed after the death of her husband, the attainder and the reversal of it; and her own title, *scil.* her marriage, and the seisin of her husband before the fine: and the petition being endorsed by the Queen, *fiat droit aux parties*, &c. the same was sent into the Chancery, as the manner is.

And in this case divers objections were made against the demandant.

1. That the said fine with proclamations should bar the wife of her dower, and the attainder of her husband should not help her; for as long as the attainder doth remain in force, the same was also a bar of her dower, so as there was a double bar to the wife, *viz.* the fine levied with proclamations, and the five years past after the death of her husband, and the attainder of her husband of his treason. But admit that the attainder of the husband shall avail the wife in some manner, when the same is now reversed in a writ of error, and now upon the matter is in judgment of law, as if no attainder had been: and against *that* a man might plead, that there is no such record, because that the first record is reversed, and utterly disaffirmed and annihilated, and now by relation made no record *ab initio*,
 and

Part XIII. MENVIL's Case, in the Chancery.

and therewith agreeth the book of 4 H. 7. 11. for the words of the judgment in a writ of error are, *quod judicium prædict' & errores prædict' & alios in recordo, &c. revocetur & annulletur, &c. & quod ipsa ad possessionem suam sive seisinam suam* (as the case requireth) *tenementorum * suorum prædict' una cum* Page [20] *exitibus & proficuis inde a tempore judicii prædict' reddit' percept' & ad omnia quæ occasione judicii illius amisit restituatur.* By which it appeareth, that the first judgment, which was originally imperfect and erroneous, is for the same errors now annulled and revoked *ab initio*; and the party, against whom the judgment was given, restored to his possessions, and to all the mesne profits, from the time of the erroneous judgment given, until the judgment in the writ of error, so as the reversal hath a retrospect to the first judgment, as if no judgment had been given: and therefore in 4 H. 7. 10. b. the case is, A. seised of land in fee, was attainted of high treason, and the King granted the land to B. and afterwards A. committed trespasss upon the land, and afterwards by Parliament A. was restored, and the attainder made void, as if no act had been; and shall be as available and ample to A. as if no attainder had been: and afterwards B. bringeth trespasss for the trespasss mesne; and it was adjudged in 10 H. 7. fol. 22. b. that the action of trespasss was not maintainable, because that the attainder was disaffirmed and annulled *ab initio*. And in 4 H. 7. 10. it is holden, that after a judgment reversed in a writ of error, he who recovered the land by erroneous judgment shall not have an action of trespasss for a trespasss mesne, which was said, was all one with the principal case in 4 H. 7. 10. and divers other cases were put upon the same ground.

It was secondly objected, that the wife could not have a petition, because there was not any office by which her title of dower was found, *scil.* her marriage, the seisin of her husband, and death: for it was said, that although she was married, yet if her husband was not seised after the age that she is dowable, she shall not have dower; as if a man seised of land in fee, taketh to wife a woman of eight years, and afterwards before her age of nine years, the husband alieneth the lands in fee, and afterwards the woman attaineth to the age of nine years, and the husband dieth; it was said, that the woman shall not be endowed. And that the title of him who sueth by petition ought to be found by office, appeareth by the books in 11 H. 4. 52. 29 Aff. 31. 30 Aff. 28. 46 E. 3. bre. 618. 9 H. 7. 24. &c.

R 4

As

Limitations.

Vide 2 Co. 93.

3 Co. 87.

8 Co. 72, 100.

9 Co. 140, &c.

10 Co. 49, 99.

Cumb. 70.

Farr. 5, 12, &c.

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Relation.

See 3 Co. 29.

4 Co. 42.

Plow. 31, 260.

Moor 140.

Cro. El. 196,

739.

As to the first objection, it was resolved, that the wife should be endowed, and that the fine with proclamations was not a bar unto her, and yet it was resolved that the act of 4 H. 7. c. 24. shall bar a woman of her dower by a fine levied by her husband with proclamations, if the woman doth not bring her writ of dower within five years after the death of her husband, as it was adjudged, Hil. 4 H. 8. rot. 344. in the Common Pleas, and 5 El. Dyer 244. For by the act, the right and title of a feme covert is saved, so that she take her action within five years after she becomes uncovert, &c. but it was resolved, that the wife was not to be aided by that saving; for in respect of the said attainder of her husband of treason, she had not any right of dower at the time of the death of her husband, nor can she after the death of her husband bring an action, or prosecute an action to recover her dower, according to the direction and saving of the said act: but it was resolved, that the wife was to be aided by another former saving in the same act, viz. and saving to all other persons (*scil.*) who were not parties to the fine) such actions, right, title, claim, and interest in or to the said lands, &c. as shall first grow, remain, descend, or come to them after the said fine ingrossed, and proclamations made, * by force of any gift in tail, or by any other cause or matter had and made before the said fine levied, so that they take their actions and pursue their right and title according to the law, within five years next after such action, right, claim, title, or interest to them accrued, descended, fallen, or come, &c. And in this case the action and right of dower accrued to the wife after the reversal of the attainder, by reason of a title of record before the fine, by reason of the seisin in fee (had) and the marriage, (made) before the fine levied, according to the intention and meaning of the said act.

And as to the said point of relation, it was resolved, that sometimes by construction of law a thing shall relate *ab initio* to some intent, and to some intent not; for *relatio est fictio juris*, to do a thing which was and had essence, to be annulled *ab initio*, betwixt the same parties to advance a right, or *ut res magis valeat quam pereat*: but the law will never make such a construction to advance a wrong, which the law abhorreth, or to defeat collateral acts which are lawful, and principally if they do concern strangers: and this appeareth in this case (*scil.*) when an erroneous judgment is reversed by a writ of error: for true it is, as it hath been said, that as to the mesne profits, the same shall have relation by construction of law until

until the time of the first judgment given, and that is to favour justice, and to advance the right of him who hath wrong by the erroneous judgment. But if a stranger hath done a trespass upon the land in the mean time, he who recovereth after the reversal, shall have an action of trespass against the trespassors; and if the defendant pleadeth that there is no such record, the plaintiff shall shew the special matter, and shall maintain his action, so as unto the trespassors who are wrong doers, the law shall not make any construction by way of relation *ab initio* to excuse them, for then the law by a fiction and construction should do wrong to him who recovereth by the first judgment: and for the better apprehending the law on this point, it is to know, that when any man recovers any possessions or seisin of land, in any action by erroneous judgment, and afterwards the judgment is reversed as is said before, and upon *that* the plaintiff in the writ of error shall have a writ of restitution, and that writ reciting the first recovery, and the reversal of it in the writ of error, is, that the plaintiff in the writ of error shall be restored to his possession and seisin, *una cum exitibus* thereof from the time of the judgment, &c. *Tibi præcipimus quod eundem A. ad plenariam seisinam tenementorum prædicti cum pertinentiis sine dilatione restitui facias, et per sacramentum proborum & legalium hominum de com' tuo diligenter inquiras ad quantum exitus & proficua tenementorum illorum cum pertinentiis a tempore falsi judicii prædicti reddit' usque ad Oct. Sancti Mich. anno, &c. quo die judicium illud per præfat' Justiciar' nostros revocat' fuit, se attingunt, juxta verum valorem eorundem, eadem exitus et proficua de terris & catallis prædicti B. in balivâ tuâ fieri facias, et denarios inde præfato A. pro exitibus & proficuis tenementorum per eundem B. dicto medio tempore percept' sine dilatione haberi facias: et qualiter hoc præceptum nostrum fuerit execut' constare facias, &c. in Octab', &c.* By which it appeareth, that the plaintiff in the writ of error shall have restitution against him who recovereth of all the mesne profits, without any regard by them taken; for the plaintiff in the writ of error cannot have any remedy against any stranger, but only against him who is party to the writ of error, and therefore the words of the said writ * command the Sheriff to enquire of the issues and profits generally, between the reversal and the judgment, with all which he who recovers shall be charged, and as the law chargeth him with all the mesne profits, so the law gives to him remedy, notwithstanding the reversal, against all trespassors in the *interim*, for otherwise the law should make

make a construction by relation to discharge them who are wrong doers, and to charge him who recovers with the whole, who peradventure hath good right, and who entereth by the judgment of the law, which peradventure is reversed for want of form, or negligence or ignorance of a Clerk. And therefore as to that purpose the judgment shall not be reversed *ab initio*, by a fiction of law, but as the truth was, the same stands in force until it was reversed: and therefore the plaintiff in the writ of error after the reversal shall not have an action of trespass for a trespass mesne, because he shall recover all the mesne profits against him who recovered, nor he that recovereth shall be after barred of his action of trespass for a trespass mesne, by reason that his recovery is reversed, because he shall answer for all the mesne profits to the plaintiff in the writ of error: and therewith agreeth Brian Chief Justice, 4 H. 7. 12. a.

3 Co. 25, 26, &c.
Pop. 87.
Moor Ca. 384.

Note reader, if you would understand the true sense and judgment of the law, it is needful for you to know the true entries of judgments, and the entries of all proceedings in law, and the manner and the matter of writs of execution of such judgments. See Butler and Baker's case in the Third Part of my Reports, good matter concerning relations. So as it was resolved in the case at bar, although that to some intent the reversal hath relation, yet to bar the wife of her dower by fiction of law, by the fine with proclamations, and five years past after the death of her husband, when in truth she had not cause of action, nor any right or title so long as the attainder stood in force, should be to do wrong by a fiction of law, and to bar the wife, who was a mere stranger, and who had not any means, to have any relief until the attainder was reversed.

And as unto the other point or objection, that the demandant on the petition ought to have an office found for her, it was resolved, that it needed not in this case, because that the title of dower stood with the Queen's title, and affirmed it; otherwise if the title of the demandant in the petition had disaffirmed the Queen's title; also in this case, the Queen was not intitled by any office that the wife should be driven to traverse it, &c. for then she ought to have had an office to find her title: but in case of dower, although that office had been found for the Queen which doth not disaffirm the title in dower, in such case the wife shall have her petition, without office, because that dower is favoured in law, she claiming but only for term of life, and affirming the title of the Queen. See the Sadler's case in the Fourth Part of my Reports.

And

Part XIII. in the Chancery.

And the case which was put on the other side was utterly denied by the court, for it was resolved, that if a man seised of lands in fee, taketh a wife of eight years of age, and alieneth his lands, and afterwards the wife attaineth to the age of nine years, and afterwards the husband dieth, that the wife shall be endowed: for although at the time of the alienation the wife was not dowable; yet, forasmuch as the marriage and seisin in fee, was before the alienation, and the title of dower is not consummate until the death of her husband, so as now there was marriage, seisin of fee, age of nine years, during * the coverture, and the death of the husband, for that cause she shall be endowed: for it is not requisite that the marriage, seisin and age concur together all at one time, but it is sufficient if they happen during the coverture: so if a man seised of lands in fee take a wife, and afterwards she elopes from her husband, now she is barred of her dower, yet if during the elopement the husband alieneth, and after the wife is reconciled, the wife shall be endowed: so if a man hath issue by his wife, and the issue dieth, and afterwards land descendeth to the wife, or the wife purchaseth land in fee, and dieth without any other issue, the husband (for the issue which he had before the descent or purchase) shall be tenant by the curtesy, for it is sufficient if he have issue, and that the wife be seised during the coverture, although that it be at several times. But if a man taketh an alien to wife, and afterwards he alieneth his lands, and afterwards she is made a denizen, she shall not be endowed, for she was absolutely disabled by the law, and by her birth not capable of dower, but her capacity and ability began only by her denization; but in the other case there was not any incapacity or disability in the person, but only a temporary bar, until such age or reconcilment, which being accomplished, the temporary bar ceaseth: as if a man seised of lands in fee, taketh a wife, and afterwards the wife is attainted of felony, and afterwards the husband alieneth, and afterwards the wife is pardoned, and afterwards the husband dieth, the wife shall be endowed, for by her birth she was not incapable, but was lawfully, by her marriage and seisin in fee, entitled to have dower; and therefore, when the impediment is removed, she shall be endowed.

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(8) SPRAT and HEAL's Case.

Trin. 44 Eliz.

In the King's Bench.

Tithes subtract-
ed, covin, vide
Ant. 12.
Post. 37, 38,
48, &c.
5 Co. 2. Part
67, 68.
Watf. 540, 555,
588, &c. 513,
&c. 632, &c.

JOHAN SPRAT libelled in the spiritual court against Walter Heal, for subtraction of tithes; the defendant, in the spiritual court, pleaded, that he had divided the tithes from the nine parts: and then the plaintiff made addition to the libel (in the nature of a replication) *scil.* that although the defendant divided the tithes from the nine parts, *quod prædict'* the plaintiff *non fatetur, sed prorsus diffitetur*; yet presently after this pretended division *in fraudem legis*, he took and carried away the same tithes, and converted them to his own use; and the plaintiff thereupon obtained sentence in the spiritual court; and to recover the treble value, according to the statute of 2 Ed. 6. cap. 13. And thereupon Heal made a surmise, that he had divided his tithes, and that the plaintiff ought to sue in the spiritual court for the double value, and at the common law for the treble value: and it was objected, that when the owner of the corn divides them, then they are become lay-chattels, for the taking of which an action lieth at the common law; and therefore, after severance from the nine parts, the Parson shall not sue for them in the spiritual court.

But it was resolved by the whole court, that the said division or severance mentioned in the libel, was not any division or severance within the stat. of 2 Ed. 6. c. 13. For the same act provides, that every of the King's subjects shall, from henceforth, "truly and justly, without fraud * or guile, divide, set out, "yield, and pay all manner" of other predial tithes in their proper land, so as when he divides them to the purpose to carry them away, he doth not divide them justly and truly, without fraud or guile; but here is fraud and guile, and no way a just divisor

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division, and therefore the same is out of the statute, for the makers of the statute respect *quo animo* he divides them (*scil.*) with a mind and intention that the Parson carry them away, as in right he ought, or with a mind and intention that he himself carry them away, which he ought not, *quia fraus & dolus alicui praeesse, aut simplicitas alicui obesse non debet*: and the same is, *crimen stellionatum*, which we call *fraudis rem & imposturam*: and where the words of the statute are, divide, set out, &c. their predial tithes, &c. And if any person carrieth away his corn and hay, and his and their predial tithes, &c. And to make an evasion out of these words, this invention was devised; the owner of the corn by covin sold his corn before severance to another, and then, as servant to the vendee, reaped the corn, and carried away the corn, without any severance; pretending, that neither the vendee, because he did not carry them away, nor the vendor, because he had no property in them, for he did not carry away his corn, or his predial tithes, should be within that statute: but it was resolved, that the vendor should be charged in that case with the penalty of the statute, for he carried them away, *in fraudem legis*, and his fraud and covin should not help him or avail him. See 8 Ed. 3. 290. A real action brought by a man of religion by collusion, although that he hath right, yet he shall not have execution, 9 Hen. 6. 41. A recovery upon a good title by collusion, shall not abate the writ, 33 Hen. 6. 5. A sale in open market by covin, shall not bind the property of a stranger: but it was resolved, that the plaintiff could not sue in the spiritual court for the treble value, but for the double value that he might. 2 Danv. 223.
Post 48.

[Note, the suit for the treble value on that statute, must be at the common law.]

(9) NEALE's and ROWSE's Case.

Hil. 6 Jac.

In the Common Pleas.

Extortion.
Stat. 25 H. 8.
cap. 5.
See 10 Co. 101.
12 Co. 78.
1 Hawk. 68.
3 Inst. 147, 149,
150.
See Sir John
Bennet's Case.
4 Inst. 336.

AT a *Nisi prius* in London, before myself this term, the case was this: Edward Neale informed upon the statute 21 H. 8. cap. 5. which plea begun *Mich. 6 Jac. rot. 1031.* against James Rowse, Commissary and Official within the archdeaconry of Huntington, within the diocese of Lincoln, and having probate of wills and testaments, &c. within the same archdeaconry; and that Nicholas Neale, the third year of the reign of the King that now is, made his testament and last will in writing, and made the plaintiff his executor, and died possessed of goods and chattels to the value of a hundred and fifty pounds: the defendant, then Commissary and Official, &c. the 23d of February, 1605, at the parish of St. Mary Bow, *testament' prædict' probavit, insinuavit, registravit & sigillavit; ac per manus cujusdam Thomæ Nicke tunc ministri ipsius Jacobi Rowse in eâ parte deputat' et autorizat' 14s. 10d. pro probatione, insinuatione et registratione testamenti prædict' de eodem Edwardo, &c. qui tam, &c. colore officii sui prædict' ad-tunc et ibidem extorsivè recepit, et habuit contra formam statuti prædict'* with this, that the said Edward, *qui tam, &c.* will add, that the writing of the said testament, according to the rate of a penny for every ten lines of the said testament, every line thereof containing * in length ten inches, *non attingebat,* to the sum of 12s. 4d. according to the form of the statute aforesaid, &c. The defendant pleaded *nihil debet,* and at the *Nisi prius*, the evidence of two witnesses was, that the plaintiff caused the said testament which was in paper, to be engrossed in parchment; and the plaintiff offered both to the said Rowse, the Official, to be proved; and he answered, that he would prove it if his fees shall be paid to him; and the plaintiff asked him what were his fees, and he wrote them in a paper, which amounted to 14s. 10d. for

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for the probate, insinuation, registering, and sealing: and thereupon the plaintiff laid upon the table 20s. and desired him to take as much as was due to him, and all that was in the house of the Official; but he would receive nothing there but appointed the plaintiff to come in court, where he would receive his fees, and accordingly the plaintiff came to him in court, and prayed to have the said will proved; and the defendant required the said Nicke his Minister, to take of him for the probate, insinuation, registering, and sealing, 14s. 10d. and thereupon he put the seal of his office to the said parchment ingrossed, which the plaintiff brought with him, and which he delivered to the defendant. And it was objected, that this case was out of the said statute, for thereby as to this purpose, it is provided, viz. and where the goods of the testator, &c. amount above the value of 40l. that then the Bishop, nor Ordinary by him or themselves, nor any of his or their registers, scribes, praisers, summoners, apparators, or any other their Ministers, for the probate, insinuation, and approbation of any testament or testaments, &c. for the registering, sealing, writing, praising, making of inventories, making acquittances, fines, or any thing concerning the same probate of testaments, shall take, or cause to be taken, of any person or persons, but only 5s. and not above, whereof to the Bishop, Ordinary, &c. for him and his Ministers 2s. 6d. and not above, and 2s. 6d. to the Scribe for registering of the same, &c. And it was objected by the counsel of the defendant, that the defendant did not take the 14s. 10d. for the probate, insinuation, registering, or sealing of the testament for no probate was written upon the testament itself, nor any seal put to it, but the testament was ingrossed in parchment, and the probate and seal put to the transcript ingrossed, and not to the testament itself, and so out of the statute; and the statute extends only when the probate and seal is put to the testament itself, and for the ingrossing of it after the probate, no certain fee is provided by the statute; but for the registering of it after it is proved, there is an expresse fee in the statute: but I conceived that the said taking the 14s. 10d. in the case at bar, was directly against the statute: for the act is in the negative, and if the executor requireth the testament to be ingrossed in parchment, he ought to agree with him whom he requireth to do it, as he may: but the Ordinary, Official, &c. ought not to exact any fee for the same of the party as a thing due to him, for divers causes.

I. Because

1. Because the words of the act are expressed, for the probate, &c. and for the registering, sealing, writing, praising, making of inventories, fines, giving acquittances, &c. which word (*writing*) extends expressly to this case.

* 2. The words are, or any thing concerning the same probate, and when the seal and probate is put to the transcript, the same, without question, concerns the probate, for the probate is not put to any writing but only to that, therefore the same concerns the probate.

3. Such a construction should make the act idle and vain, for if the Ordinary, Official, &c. might take as much as he pleaseth for the ingrossing done by his Ministers, as a fee due to him, all the purview of the statute which is penned so precisely concerning persons, *scil.* Bishops, Ordinaries, and all persons who have power to prove wills and testaments, Registers, Scribes, Summoners, Apparators, or any other the Ministers, as for the thing itself, *scil.* the probate, insinuation, approbation, registering, sealing, writing, praising, making of inventories, fines, giving of acquittances, or any other thing concerning the same, should be all in vain, by that evasion of transcribing of it, as well against the express letter of the act as the intention and meaning of it: also the statute saith 5s. and not above, so as the manner of precise penning of it excludes all nice evasions: and the act ought to be expounded to suppress extortion, which is a great affliction, and impoverishing of the poor subjects.

4. As this case is, he annexeth the probate and seal to the transcript ingrossed, which the plaintiff brought with him and offered to the defendant; so as the case at bar was without question, and generally the Ordinary, Official, &c. cannot exact or take any fee for any thing which concerns the probate of a will or testament, but that which the statute limits: and afterwards the jury found for the plaintiff, and of such opinion was Walmsley, Warburton, Daniel, and Foster, Justices, the next term in all things, but upon exception in arrest of judgment for not pursuing of the act, in the information, judgment is not yet given, &c.

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Hil. 6 Jacobi.

In the Common Pleas.

NOTA, that in this term a question was moved to the court, which was this: if tenant in burgage should pay aid unto the King to make his eldest son a Knight. And the point rests upon this, if the tenure in burgage be a tenure in socage; for by the ancient common law every tenant in knight's service, and every tenant in socage, was to give to his lord a reasonable aid to make his eldest son a Knight, and to marry his eldest daughter, and that was uncertain at the common law, and also uncertain when the same should be paid. And this appeareth by Glanvil, lib. 9. cap. 8. fol. 70. who wrote in the time of Henry II. *Nihil autem certam statutum est de hujusmodi auxiliis dandis, vel exigendis, etc. sunt alii præterea casus in quibus licet dominis auxilia solvenda sunt certa forma præscripta ab hominibus suis ut filius suus et hæres fiat Miles, vel si primogenitam suam filiam maritaverit, etc.* And in the beginning of the chapter it is called *Rationabile auxilium*, because then it was not certain, but to be moderated by reason in respect of circumstances: and by the preamble of the statute of Westm. 1. anno 3 E. 1. cap. 35. where it is said, forasmuch as before that time reasonable aid to make one's son Knight, or to marry his daughter, was never put in certain, * nor when the same ought to be paid, nor how much be taken; the said act put the said two uncertainties to a certainty. 1. That for a whole knight's fee there be taken but 20s. and of 20l. lands holden in socage 20s. and of more, more, and of less, less, according to the rate by which the aid itself was made certain. 2. That none might levy such aid, to make his son a Knight, until his son be of the age of fifteen years, nor to marry his daughter until she be of the age of seven years. And Fleta, who wrote after the said act, calls them *rationabilia auxilia ad filium Militem faciendum, vel ad filiam primogenitam maritandum*: and by the statute of 25 Edw. 1. where it is provided, that no taxes shall be taken but by common consent of the realm, there is an exception of the ancient aids, &c. which is to

Aid to make the King's eldest son Knight. Vide post. 28. and Gilbert's Historical View. cap. 2, 3. and Paul. Manut. post.

Vide F. N. B. 82. ac.

See the statute of 27 H. 8. cap. 10. of uses in the preamble, concerning aids, to make the eldest son Knight, and to marry the daughter.

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Vide Paulum
Manutium de
Senatu Romano,
pag. 9. of Aids
instituted by Ro-
mulus ad redi-
mendum corpus
Domini, & ad
filias collocan-
das, &c. per
clientes erga
patronos.
Burgage tenu e,
quid.

be intended of these aids due unto the King by the ancient common law: but notwithstanding the said act of Westm. 1. it was doubted, whether the King, because he is not expressly named, was bound by it; and therefore in the 20th year of Ed. 3. the King took an aid of 40s. of every knight's fee for to make the Black Prince Knight, and nothing then of lands holden in socage; and to take away all question concerning the same, the same was confirmed to him in Parliament: and afterwards anno 25 E. 3. cap. 11. it is enacted, that reasonable aid to make the King's eldest son Knight, and to marry his eldest daughter, shall be demanded and levied after the form of the statute made thereof, and not in other manner; that is to say, of every Knight's fee holden of the King without mean 20s. and no more, and of every 20l. land holden of the King without mean in socage 20s. and no more. Now Littleton, lib. 2, cap. 10. fol. 36. b. saith, burgage-tenure is, where an ancient borough is, of which the King is lord; and those who have tenements within the borough, hold of the King their tenements, that every tenant for his tenement, ought to pay to the King a certain rent: and such tenure is but tenure in socage; and all socage-land is contributory to aid, and therefore a tenant in burgage shall be contributory to it.

And it is to be observed, and so it appeareth in the Register, fol. 1 and 2. That in a writ of right, if the lands or tenements are holden by knight's service, it is said, *quas clamat tenere de te per servitium unius feodi Militis*: and if the lands be holden in socage, the writ is, *quas clamat tenere de te per liberum servitium unius libræ cumini*, &c. so as socage-tenure in all writs is called *Liberum servitium*. And by the writ of aid, F. N. B. 82. it is commanded to the Sheriff, *quod juste, &c. facias habere A. rationabile auxilium de militibus, et liberis tenentibus suis in baliwa tuâ, &c.* so as the same writ makes a distinction of knight's service by the name of *Militibus*, and of socage by the name of *Liberis tenentibus*. And in the Register, fol. 2. b. the writ of right for a house in London (which is holden of the King in burgage) is in these words, *Rex. Majori, vel custodi & Vicecom', London: præcipimus vobis quod sine dilatione teneatis G. de uno messuagio, &c. in London, quæ clamat tenere de nobis per liberum servitium, &c.* which proves, that tenure in burgage is a tenure in socage: but it appeareth by the books of A-vowry 26. and 10 Henry 6. so Ancient Demesne 11. it was resolved by all the Justices in the Exchequer-chamber, that no tenure should pay for a reasonable aid to marry the

the daughter, or to make the son a Knight, but tenure by knight's service, and tenure by socage; but not tenure by grand serjeanty, nor no other: and 13 H. 4. 34. agrees to the case of grand * serjeanty: and by the said books it appeareth, that tenure by frankalmoign, and tenure by divine service, shall not pay, for they are none of them: but tenure in burgage is a tenure in socage; and therefore the said books prove, that such a tenure shall pay aid. And I conceive, that tenure by petit serjeanty shall pay also aid. For Lit. lib. 2. cap. 8. fol. 36. says, that such a tenure is but socage in effect: but Fitz. N. B. 83. A. avoucheth 13 H. 4. 34. that tenant by petit serjeanty shall not pay aid: for the book only extends to grand serjeanty: if the houses in a city or borough are holden of the King in burgage, and the King grant the feignories to one, and the city or borough to another to hold of him, then those houses shall not be contributory to aid, for they are not immediately holden of the King, as is required by the law.

And I conceive, that he who holdeth a rent of the King by knights service, or in socage, shall pay aid; for the words of the act of Westm. cap. 36. are, from henceforth of a whole knight's fee only be taken 20s. of 20l. land holden in socage 20s. and the mesne is said in supposition of law to hold the land: and it is not reason that the tenant by a feoffment before the statute should prejudice the lord of his benefit. And although it was said, that a tenure in socage is *servitium socæ*, as Littleton saith, and the same cannot be applied to houses: to that it was answered, that the land upon which the house is built, or if the house falleth down, may be made arable, and be ploughed. And a rent may be holden in socage, and yet it is not subject to be ploughed, but by a possibility afterwards escheat to the lord of the land. See Huntington, Polydore Virgil, and Hollingshed's Chronicle, fol. 35. 15 Hen. 4. Aid was levied by Hen. 2. to marry Maud his eldest daughter to the Emperor, viz. 3l. of every hide of land, &c. And see the Grand Customary of Normandy, cap. 35. there is a chapter of aids, whereof the first is, to make the eldest son of his lord a Knight; and the second to marry his eldest daughter. And see a statute made in anno 19 H. 7. which beginneth thus, *Item præfati Communes in Parlamento prædicto existentes ex assensu Dominorum spiritualium & temporalium in dicto Parlamento similiter existentes concesserunt præfato Regi quandam pecuniæ summam in loco duorum rationalium auxiliorum suæ majestati de jure debitum tam ratione crea-*

1 Inst. 162. b.

2 Inst. 231, 232, &c.

11 Co. 44.

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Note.
See Mr. Madox's
Firma Burgi.
cap. 7.

tionis nobilissimi filii sui primogeniti bonæ memoriæ, Domini Arthuri nuper Principis Walliæ, quam ratione matrimonii et translationis nobilissimi Principis Margaritæ filiæ suæ primogeniti quam etiam multiplicare pro regni sui perpetua pace et tranquillitate, &c. certis viis et modis levand' cujus quidem concessionis tenor, &c. sequitur in hæc verba: forasmuch as the King, our sovereign lord, is rightfully intituled to have two reasonable aids, according to the law of this land, the one for the making Knight the right honourable his first begotten son Arthur, late Prince of Wales, deceased, and the other for the marriage of the right noble Princess his first begotten daughter Margaret, now married to the King of Scots: and also that his Highness hath born great and inestimable charges for the defence of the realm, &c. considering the premises; and if the same aids should be levied and had, by reason of their tenures, according to the ancient laws of the land, should be to them doubtful and uncertain, and great unquietness, for the search and not knowledge of their several tenures, and their lands chargeable to the same, have made humble petition unto his Highness graciously to accept and take of them the sum of 40,000l. * as well in recompence and satisfaction of the said two aids, as for the said great and inestimable charges, &c. as is aforesaid. The King, to eschew and avoid the great vexation, troubles and unquietness which to them should have ensued, if the said aids were levied after the ancient laws: and for the good and acceptable services of the Nobles of this realm, and other his faithful subjects, in their own persons, and otherwise done to his grace, and thereby sustained manifold costs and charges, to his great honour and pleasure, doth pardon the said two aids, and accepteth the offer aforesaid: and that the poorest of his said Commons should not be contributory to the said sum of 40,000l. hath pardoned 10,000l. parcel thereof, and doth accept of 30,000l. in full satisfaction, &c. And that the cities and boroughs, towns, and places, being in every shire not by themselves accountable in the Exchequer for fifteenths and tenths, be chargeable with the shires, &c. And all cities and boroughs not contributory, &c. but accountable by themselves, &c. shall be chargeable by themselves, towards the payment of the said 30,000l. with such sums as under the act particularly appear, &c. And there under the act appear the several taxations of every several county, city, borough, &c. and that the city of London is taxed to 618l. 3s. 5d. the city of Norwich to 81. 6s. 11d. the city of Canterbury to 53l. 13s. 3d. *ab' Norfolk,*

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folk, 286l. 6s. 10d. Suffolk, 1214l. 5s. 4d. ob., &c. The sum of all the sums then expressed, is 31,648l. whereof allowable for fees and wages of Commissioners and Collectors 651l. 16s. 2d. and so remaineth 31006l. 4s. and 10d. Note, that the universities of Cambridge and Oxford, and the college of Eton be excepted.

See rot. 30 H. 3. *ex parte remem' Dom' Thesaur' in scaccario, in auxilio nobis concess' ad primogenitam filiam nostram maritand'*. And note, that King Henry III. had aid granted to him in Parliament *ad Isabellam sororem suam imperatori maritand'* but that was of benevolence.

Mat. Paris.

Benevolence.
See 12 Co. 119,
120.

Rot. 42 H. 3. *ibid.* 6. *Monstrat R. Johannes le François Baro de Scaccario, quod cum dominus Rex non caperet nisi 20 s. de integro feodo militis de auxilio ad primogenitam filiam suam maritand' Radol' fil' Rad' fil' Mich' injuste exegit de eodem 30 s. ad primogenitam filiam suam maritand' pro duabus partibus unius feodi militis, et averia sua cepit, & ea detinet. Et ideo mandatum est Vic' com' Bedd' & Buck' quod venire faciant, &c. prædict' R. ad respondendum eidem Johanni de prædict' transgressione, et prædict' averio, &c.* So as it appeareth by this, that some held, that the statute of Westm. 1. aforesaid was but a confirmation of the common law, and that the King also ought not to take more: but that was doubted.

Ib. in regno 2 Ed. 1. rot. 3. de auxilio ad militiam, (which is meant of knighthood of the King's son) in the time of Henry III. *et Isabella Comitissa Albermarle, perdonata 116l. 8s. 7d. pro eodem auxilio, quia Baldwinus de insula frater ejus cujus hæres ipsa est fuit infra ætatem, et in custodia ejus: & quia tenentes dictæ Isabellæ onerentur per servitium militare de prædict' pecuniis.* Note, that that was before the statute of Westm. 1. and by that it appeareth, that if one within age be in ward of the King, he shall not be contributory to aid, but his tenants which hold of him (and then held of the King by reason of ward) shall pay aid unto the King, as it appeareth by that record.

*Ibid. 30 Ed. 1. Rex dilectis & fidelibus, Vic' Kanc' & Rico de R. * salutem. Sciatis, quod in primo die Junii anno regni nostri 18. Prælati, Comites, Barones, et cæteri Magnates, de regno nostro conceditur, pro se et tota communitate ejusdem regni in pleno Parlamento nostro, nobis concesserunt 40 s. de singulis feodis militum in dicto regno ad auxilium ad primogenitam filiam nostram maritand' levandos, sicut hujusmodi auxilium alias in casu consimil' levare consuevit, cui quidem levationi faciend' pro dicta communitatis easimento hucusque supersedimus faciend' gratiose assignavimus vos ad prædictam auxilium, &c.* Note, that his eldest daughter was married to the Earl of Bar.

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Note, that this double charge was in respect that they were discharged of any contribution for socage, which I conceive was for the difficulty to find the socage tenure.

Ibid. T. R. 34 Ed. 1. De auxilio concessio ad militiam filii Regis.

Ibid. Hil. 4 Hen. 4. Rot. 19. De rationabili auxilio de Will. Domino Ross, for the marriage of Blanch the King's eldest daughter, out of the manor of Wragby in the county of Lincoln: the like *M. Rot. 5 H. 4. rot. 33. Lincoln, and rot. 34. Lincoln, and rot. 35. Lincoln, and Tr. R. 5 H. 4. rot. 2. Kanc. and rot. 3. Kanc', and rot. 5. Kanc'.*

See *ibid. T. R. 21 Ed. 3. rot. Cantab' de auxilio de filium Regis primogenitum milit' faciend' per Episcopum Eliensem:* by which it appeareth, that a Bishop, for his lands which he holdeth by knight's service, or socage, shall pay aid: but those who hold by frankalmoign, or by divine service, shall not pay aid, as before is said.

See *ibid. 20 Ed. 3. rot. 13. and 14. de auxiliando ad primogenitum filium Regis militem faciend'* and collectors thereupon appointed. By all which before cited, it appeareth, that tenure in burgage is subject to the payment of aid. And note, that a great part of London was abbey or chauntry land, and the lands of persons attainted: and all those which are immediately holden of the King by knight's service, or in socage, shall be contributory to the payment of aid, &c.

(ii) PROHIBITIONS.

Hil. 6 Jacobi.

President of
York.

See 4 Inst. 242,
245.

12 Co. 48, 50, 52.

UPON Wednesday, being Ash-Wednesday, the day of February, 1606, A great complaint was made by the President of York unto the King, that the Judges of the common law had, in contempt of the command of the King the last term, granted sixty, or fifty prohibitions at the least, out of the Common Pleas, to the President and Council of York after the 6th day of February, and named three in particular, (*scil.*) one between Bell and Thawptes, another between Snell and Huet, and another in

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in an information of a riotous rescue preferred by English bill by the Attorney General against Christopher Dickenson, one of the Sheriffs of York, and divers others, in rescuing of one William Watson out of the custody of the Deputy of one of the Pursuivants of the same Council who had arrested the said Watson by force of a commission of rebellion awarded by the President and Council, which prohibition in the said information was (as was affirmed) denied upon a motion made in the King's Bench the last term, and yet granted by us. And the King sent for me to answer to that complaint: and I only, all the rest of the Justices being absent, waited upon the King in the chamber near the gallery; who, in the presence of Egerton, Lord Chancellor, the Earl of Salisbury, Lord Treasurer, the Lord of Northampton, Lord Privy Seal, the Earl of Suffolk, Lord Chamberlain, the Earl of Worcester, the Archbishop of Canterbury, the Lord Wotton, and others of his counsel, rehearsed to me the complaint aforesaid: and I perceived well, that upon the *said information he had conceived great displeasure against the Judges of the Common Pleas, and chiefly against me; to which I (having the copy of the complaint sent to me by the Lord Treasurer the sabbath-day before) answered in this manner, that I had, with as much brevity as the time would permit, made search in the offices of the Prothonotarys of the Common Pleas: and as to the said cases between Bell and Thawptes, and Snell and Huet, no such could be found: but my intent was to take advantage of the misprisal: and the truth was, that the sixth day of February the court of Common Pleas had granted a prohibition to the President and Council of York, between Lock, plaintiff, and Bell and others defendants: and that was, a replevin in English was granted by the said President and Council, which I affirmed was utterly against law: for at the common law no replevin ought to be made, but by original writ directed to the Sheriff. And the statute of Marlbridge, cap. 21. and Westm. 1. cap. 17. hath authorized the Sheriff upon plaint made to him, to make a replevin; and all *that* appeareth by the said statutes, and by the books of 29 E. 3. 21. 8 Eliz. Dyer 245. And the King, neither by his instructions had made the President and Council Sheriffs, nor could grant to them power to make a replevin against the law, nor against the said acts of Parliament; but the same ought to be made by the Sheriff. And all *that* was affirmed by the Lord Chancellor for very good law: and I said, that it might well be that we have granted other prohibitions in other cases of Eng-

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lish replevins. Another prohibition I confess we have granted between Sir Bethel Knight, now Sheriff of the county of York, as executor of one Stephenson, who had made him and another his executors, and preferred an English bill against Chambers, and divers others in the nature of an action upon case, upon a troyer and conversion in the life of the testator of goods and chattels, to the value of 1000l. and because the other executor would not join with him, although he was named in the bill, he had not any remedy at the common law, he prayed remedy there in equity: and I say, that the President and Council have not any authority to proceed in that case, for divers causes.

1. Because there is an expresse limitation in their commission, that they shall not hold plea between party and party, &c. unless both parties, or one of them, *tanta paupertate sunt gravati*, that they cannot sue at the common law: and in that case the plaintiff was a Knight, and Sheriff, and a man of great ability.

2. By that suit the King was deceived of his fine, for he ought to have had 200l. fine, because that the damages amounted to 4000l. and that was one of the causes that the Sheriff began his suit there, and not at the common law: another cause was, that their decrees which they take upon them are final and uncontrollable, either by error, or any other remedy. And yet the President is a Nobleman, but not learned in the law; and those which are of the Council there, although that they have the countenance of law, yet they are not learned in the law; and nevertheless they take upon them final and uncontrollable decrees in matters of great importance: for if they may deny relief to any at their pleasure without controulment, so they may do it by their final decrees without error, appeal, or other remedy: which is not so in the King's courts where there are five Judges; for they can deny justice to none who hath right, nor give any judgment, but the same is controulable by a writ of error, &c. * And if we shall not grant prohibitions in cases where they hold plea without authority, then the subjects shall be wrongfully oppressed without law, and we restrained to do them Justice: and their ignorance in the law appeareth by their allowance of that suit, *scil.* that the one executor had no remedy by the common law, because the other would not join in suit with him at the common law: whereas every one learned in the law knoweth, that summons and severance lieth in any suit brought as executors: and this also in that particular case was affirmed by the Lord Chancellor;

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PROHIBITIONS.

cellor ; and he much inveighed against actions brought there upon trover and conversion, and said, that they could not be found in our ancient books.

Another prohibition I confess we have granted, between the Lord Wharton, who by English bill sued before the Council, Banks, Buttermere, and others, for fishing in his several fishings in Darwent in the county of C. in the nature of an action of trespass at the common law, to his damage of 200l. And for the causes next before recited, and because the same was merely determinable at the common law, we granted a prohibition ; and that also was allowed by the Lord Chancellor. And as to the case of information upon the riotous rescous. I having forgotten to speak to that, the King himself asked what the case was ? To whom I answered, that the case was, that one exhibited a bill there in the nature of an action of debt, upon a *Mutuatus* against Watson, who upon his oath affirmed, that he had satisfied the plaintiff, and that he owed him nothing ; and yet because the defendant did not deny the debt, the Council decreed the same against him, and upon that decree the Pursuivant was sent to arrest the said Watson, who arrested him, upon which the rescous was made : and because that the suit was in the nature of an action of debt upon a *Mutuatus* at the common law, and the defendant at the common law might have waged his law, of which the defendant ought not to be barred by that English bill, *quia beneficium juris nemini est auferendum* : the prohibition was granted ; and that was affirmed also by the Lord Chancellor : whereupon I concluded, that if the principal cause doth not belong unto them, all their proceedings was *coram non judice*, and then no rescous could be done : but the Lord Chancellor said, that though the same cannot be a rescous, yet it was a riot, which might be punished there : which I denied, unless it were by course of law by force of a commission of *Oyer and Terminer*, and not by an English bill : but to give the King full satisfaction in that point, the truth is, the said case was debated in court, and the court inclined to grant a prohibition in the said case ; but the same was stayed to be better advised upon, so as no prohibition was ever under seal in the said case.

Also I confess, that we have granted divers prohibitions to stay suits there by English bill upon penal statutes : for the manner of prosecution, as well for the action, process, &c. as for the count, is to be pursued, and cannot be altered, and therefore without question the
Council

Council in such cases cannot hold plea, which was also affirmed by the Lord Chancellor. And I said, that it was resolved in the reign of Queen Elizabeth in Parot's case, and now lately in the case of the President and Council of Wales, that no court of equity can be erected at this day without act of Parliament, for the reasons and causes in the report of the said case of Parot.

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And the King was well satisfied with these reasons and causes of our proceedings, who of his Grace gave me his royal hand, and I departed from thence in his favour. And the surmise of the number, and that the prohibition in the said case in the information was denied in the King's Bench, was utterly denied; for the same was moved when two Judges only were in court, who gave not any opinion therein, but required Serjeant Hutton, who moved it, to move the same again when the court was full, &c.

(12) REPAIR of BRIDGES, &c.

Pasch. 7 Jac. 1.

See 1 Hawk.c.7.
sect. 1, 2, 3, 4;
5, 6. 1 Salk.
358, 359.
12 Co. 30.
Parr. 54, 98, &c.

NOTE, that this term a question was moved at Serjeant's-Inn; who by the common law ought to repair the bridges, common rivers, and sewers, and the highways, and by what means they shall be compelled to it? And first of the bridges: and as to them it is to be known, that of common right all the county shall be charged to the reparation of a bridge; and therewith agreeth 10 Ed. 3. 28. b. That a bridge shall be levied by the whole county, because it is a common easement for the whole county; and as to that point, the statute of 22 H. 8. cap. 5. was but an affirmance of the common law: and this is true, when no other is bound by the law to repair it, but he who hath the toll of the men or cattle which pass over a bridge or causey, he ought to repair the same, for he hath the toll to that purpose, *et qui sentit commodum sentire debet & onus*; and

Part XIII. REPAIR of BRIDGES, &c.

and therewith agrees 14 E. 3. Bar 276. Also a man may be bounden to repair a bridge, *ratione tenuræ* of certain land, but a particular person cannot be bound by prescription, *scil.* that he and all his ancestors have repaired the bridge, if it be not in respect of the tenure of his land, taking of toll, or other profit; for the act of the ancestor cannot charge the heir without profit. But an Abbot or other corporation who hath a lawful being may be charged, *scil.* that he and his predecessors time out of mind, &c. have repaired the bridge; for the Abbot and Convent may bind their successors. *Vide* 21 E. 4. 28. 27 E. 3. 8. 22 Aff. 8. 5 H. 7. 3. And if an Abbot and his predecessors time out of mind have repaired a bridge of alms, they shall be compelled to repair it; and therewith agreeth 10 Ed. 3. 28. So it is of a highway of common right, all the county ought for to repair it, because that the county have their ease and passage by it, which stands with the reason of the ease of the bridge; but yet some may be particularly bounden to repair it as is aforesaid. He who hath the land adjoining, ought of common right without prescription to scour and cleanse the ditches, next to the way to his land; and therewith agreeth the book of 8 H. 7. 5. But he who hath land adjoining without prescription, is not bound to repair the way. So of a common river, of common right all who have ease and passage by it, ought to cleanse and scour it; for a common river is as a common street, as it is said in 22 Aff. and 37 Aff. 10. But he who hath land adjoining to the river is not bounden to cleanse the river, unless he hath the benefit of it, *scil.* a toll, or a fishing, or other profit. See 37 Aff. p. 10.

1 Salk. 358, 359.

Sewers:
Post. 35.

(13) Sir WILLIAM READ and
BOOTH's Case.

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Pasch. 7 Jacobi.

Case of forgery,
&c. See 1 Salk.
342, 371, 375
1 Hawk. ch. 70.
per totum.
2 Hawk. ch. 8.
sect. 38. ch. 27.
sect. 28. ch. 43.
sect. 25. ch. 46.
sect. 19, &c. 24.
4 Co. 18.
5 Co. 2. Part
50, 61.
10 Co. 103.
1 Hales H. P.C.
686.

IN the great case in the Star-chamber of a forgery between Sir William Read, plaintiff, and Roger Booth, and Cuthbert Booth, and others, defendants; the case was this:

The said Roger Booth, 38 Eliz. was convicted in that court of the publication of a writing under seal, forged in the name of Sir Thomas Gresham, of a rent-charge of an hundred pounds, out of all his lands and tenements, to one Markham for ninety-nine years, bearing date the one and twentieth year of Queen Elizabeth; the said Roger knowing it to be forged. And afterwards the said Sir William Read exhibited the said bill against the said Booth and others, for forging of another writing under seal, bearing date the twentieth of El. in the name of the said Sir Thomas Gresham, purporting a deed of feoffment of all his lands (except certain) to Sir Rowland Heyward and Edward Hoogon and their heirs, to certain uses; which was in effect to the use of Markham the younger and his heirs: and for the publication of the said writing, knowing the same to be forged, was the bill exhibited. And now upon the hearing of the cause in the Star-chamber this term, these doubts were moved upon the statute of 5 El. 1. If one who is convicted of publication of a deed of feoffment or rent-charge, knowing the same to be forged, again at another day forge another deed of feoffment, or rent-charge, if he be within the case of felony within the said act (which doubt ariseth upon these words (*estfoons*) committed against any of the said offences.) And therefore it was objected, that he ought to commit again the same nature of offence, *scil.* if he were convicted of forgery he ought to forge again, and not only publish, knowing, &c. And if first he were convicted of publishing, knowing, &c. he ought to offend again in publication, knowing, &c. and not in forgery, for (*estfoons*) which is (*iterum*) implieth that it ought to be of the same nature of offence. The second doubt was,

Part XIII. Sir William Read and Booth's Case.

was, if a man committed two forgeries, the one in 37th of Eliz. and the other in 38, and he is first convicted of the last, if he may be now impeached for the first. The third doubt was, when Roger Booth was convicted in 38 Eliz. and afterwards is charged with a new forgery in 37 Eliz. if the witnesses proving in truth that it was forged after the first conviction, if the Star-chamber hath jurisdiction of it. The last doubt was, when Cuthbert Booth, who never was convicted of forgery before, if in truth the forgery was done, and so proved in 38 Eliz. if he might be convicted upon this bill, because that the forgery is alleged before that it was done. As to the first and second doubts, it was resolved by the two Chief Justices and the Chief Baron, that if any one be convicted of forgery or publication of any writing concerning freehold, &c. within the first branch; or concerning interest or term for years, &c. within the second branch and be convicted, if afterwards he offend either against the first branch or second, that the same is felony: as if he forgeth a writing concerning interest for years within the second branch, and be convicted, and afterwards he forgeth a charter of feoffment within the first branch, or *e converso*, * that *that* is felony, and that by express words of the act; that if any person or persons being hereafter convicted or condemned of any of the said offences, (which words any of the said offences, extend to all the offences mentioned before, either in the first branch, or in the second branch) by any the ways or means above limited, shall, after any such conviction or condemnation, estoons commit or perpetrate any of the said offences, in form aforesaid, which words, "any of the said offences," &c. do extend to the nature of all the offences mentioned in the first and second branches: but if one forge a writing in 37 of Eliz. and afterwards he forge another in 38 of Eliz. yet it is not felony, although that he forgeth many writings one after the other, for by the express words of the act, it is not felony. The forgery, &c. which is felony by the act, ought to be after conviction or condemnation of a former writing. As to the third doubt, it was resolved, that the allegation of the time by the plaintiff in the bill, shall not alter the offence, but shall give unto the court jurisdiction; but if it appeareth to the court, that the forgery or publication was after the sentence, then the court shall surcease. As to the last point, it was resolved, That the time of the forgery is not material, be it before or after the offence in truth committed,

mitted, if it be committed before the exhibiting of the bill; but if the date of the writing supposed to be forged had been mistaken, there, the defendant could not be condemned of a deed of another date, for *that* is not the offence complained of in the bill, of which the court can give sentence.

(14) The Case of SEWERS.

Pasch. 7 Jacobi Regis.

Sewers, ant' 33.

See 5 Co. 2.

Part 100.

6 Co. 20.

10 Co. 138. S.C.

139 to 143.

THE case was, that there was a causey or mill-stank of stone in the river of Dee. and city of Chester, which causey before the reign of King Edward the first, was erected for the necessary maintainance of certain mills, some of the King's, and others of the subjects at the end of the said causey: and now a certain decree was made by certain Commissioners of Sewers, for a breach to be made of ten poles in length in the said causey, which causey as it was admitted by both parties was erected before the reign of King Edward the first, and so hath continued until this day without any exaltation or inhancing: and if by any decree of the Commissioners by force of any statute, any breach may be made in that causey, was the question. And it was referred by the letters of the Lords of the Privy Council, to the two Chief Justices and the Chief Baron; and upon hearing of counsel learned at divers days, and good consideration had in the time of the last vacation, of all the statutes concerning sewers, and upon conference had among themselves, it was resolved as followeth:

1. Whereas it is provided by the statute of *Magna Charta*, cap. 23. *Quod omnes kidelli deponantur de catexo per Thamesiam, et Medeweiam et per totam Angl' nisi per costeram maris.* It was resolved, that *that* statute extended only to *kidells*, *sc.* open weirs for taking of fish: but the first statute which extended to pulling down, or abating of any mills, mill-stanks and causeys, was the statute of 25 Edward 3. cap. 4. which act appointed

Part XIII. The Case of SEWERS.

appointed such only to be thrown down or abated, which were levied or erected in the reign of King Edward the first, or after: * but by the statute made *anno* 1 H. 4. cap. 12. Page [36] upon complaint in Parliament of the great damages which have risen by the outrageous inhancing of mills, mill-stanks, and other impediments made and erected before the reign of King Edward the first: the said old mills and mill-stanks were appointed by act then made to be surveyed, and such as were found to be much inhanced to be corrected and amended; saving always reasonable substance of such mills, mill-stanks, wears, &c. so in old time made and levied: none of which acts extended to the case in question; for *that* causey was erected before the reign of Edward the first, and never exalted or inhanced after the erection of it: and the statute of 12 Hen. 4. cap. 7. doth confirm all the said acts, and by them the generality of the act of *Magna Charta* is restrained, as by the said acts appeareth. And by the statute of 23 Hen. 8. cap. 5. None of the said acts, as to the case in question, is repealed; for first, the same act appoints the manner, form, tenor, and effect of the commission of Sewers, by which, power is given to the Commissioners to survey walls, &c. fences, causeys, &c. mills, &c. and then to correct, repair, amend, pull down, or overthrow, or reform, as cause requireth, according to their wisdoms and discretions; and therein as well to ordain and do after the form, tenor, and effect of all and singular the statutes and ordinances made before the first of March, in the twenty-third year of Henry the eighth, as also to enquire by the oaths of honest and lawful men, &c. through whose default the said hurts and damages have happened, &c. By which it appeareth, that the discretion of the Commissioners was limited, *scil.* to proceed according to the statutes and ordinances before made, &c. and also to reform, repair, and amend the said walls, &c. which by force of that word (*said*) hath relation to the precedent purview of the act, &c. And further to reform, prostrate and overthrow all such mills, &c. and other impediments and annoyances (aforesaid) as shall be found by inquisition or by your survey and discretion to be excessive, *i. e.* hurtful; which word (*aforesaid*) refers that clause also to the precedent purview, *scil.* such impediments and annoyances as are against the stat. and ordinances before made. Also it is further provided by the same act, that all and every statute, act, and ordinance heretofore

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heretofore made concerning the premises or any of them, not being contrary to this present act, nor heretofore repealed, shall from henceforth stand and be good and effectual for ever. But the said acts of 25 E. 3. and 1 H. 4. are not contrary to any clause of that act, nor were repealed before: and always such construction ought to be made, that one part of the act may agree with another, and all to stand together; and if they had intended a repeal of the said former acts, they would not have repealed them by such general and doubtful words, when they concerned the inheritances of many subjects: and according to this resolution we certified the Lords of the Council, that the said statutes of 25 E. 3. and of 1 H. 4. remained yet in force; and that the authority given by the commission of Sewers did not extend to mills, mill-stanks, causeys, &c. erected before the reign of King Edw. 1. unless that they have been enhanced and exalted above their former height, and thereby made more prejudicial, &c. In which case they are not to be overthrown or subverted, but to be reformed by abating the excess and enhancement only.

(15) The Case DE MODO DECIMANDI,

And of Prohibitions debated before the King's Majesty.

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* *Trin. 7 Jac. 1.*

De Modo Decimandi ant. 12. post. 58.
2 Inst. 607.
Gibson's Codex 1072.
Watson's Clergyman 503, 509, &c. 538, &c. 543, &c. to 568.

RICHARD BANCROFT Archbishop of Canterbury, accompanied with the Bishop of London, the Bishop of Bath and Wells, the Bishop of Rochester, and divers Doctors of the civil and canon law, as Dr. Dunn, Judge of the Arches; Dr. Bennet, Judge of the prerogative; Dr. James, Dr. Martin, and divers other Doctors of the civil and canon law, came attending upon them to the King to Whitehall the Thursday, Friday, and Saturday after Easter term, in the Council-chamber, where the Chief Justice and myself, Daniel

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Daniel Judge of the Common Pleas, and Williams Judge of the King's Bench, by the command of the King, attended also: where the King being assisted by his Privy Council, all sitting at the council-table, spake as a most gracious, good, and excellent sovereign, to this effect, "As I would not suffer any novelty or innovations in my courts of Justice ecclesiastical or temporal; so I will not have any of the laws, which have had judicial allowances in the times of the Kings of England before me, to be forgotten, but to be put in execution. And forasmuch as upon the contentions between the ecclesiastical and temporal courts, great trouble, inconvenience, and loss may arise to the subjects of both parts; namely, when the controversy ariseth upon the jurisdiction of my courts of ordinary justice; and because I am the head of justice immediately under God, and knowing what hurt may grow to my subjects of both sides, when no private case, but when the jurisdictions of my courts are drawn in question, which in effect concerneth all my subjects; I thought that it stood with the office of a King, which God hath committed to me, to hear the controversies between the Bishops and other of his clergy, and the Judges of the laws of England, and to take order, that for the good and quiet of my subjects, the one do not incroach upon the other, but that every of them, hold themselves within their natural and local jurisdiction, without incroachment or usurpation the one upon the other." And he said, that the only question then to be disputed was, if a Parson, or a Vicar of a parish sueth one of his parish in the spiritual court for tithes in kind, or lay-fee, and the defendant alledgeth a custom or prescription, *De Modo Decimandi*, if that custom or prescription *De Modo Decimandi*, shall be tried and determined before the Judge ecclesiastical where the suit is begun; or a prohibition lieth, to try the same by the common law. And the King directed, that we who were Judges should declare the reasons and causes of our proceedings, and that he would hear the authorities in the law which we had to warrant our proceedings in granting of prohibition in cases of *Modo Decimandi*. But the Archbishop of Canterbury kneeled before the King, and desired him, that he would hear him and others who are provided to speak in the case for the good of the church of England; and the Archbishop himself inveighed much against two things. 1. That a *Modus Decimandi* should be

* tried by a jury, because that they themselves claim more or less a *Modum Decimandi*; so as in effect they were triers in their own cause, or in the like cases. 2. He inveighed much against the precipitate and hasty trials by juries; and after him Dr. Bennet, Judge of the Prerogative court, made a large invective against prohibitions in *causis ecclesiasticis*: and that both jurisdictions as well ecclesiastical as temporal were derived from the King; but all *that* which he spake out of the book which Dr. Ridley hath lately published, I omit as impertinent: and he made five reasons, why they should try a *Modum Decimandi*.

And the first and principal reason was out of the Register, fo. 58. *quia non est consonans rationi, quod cognitio accessarii in curia christianitatis impediatur ubi cognitio causae principalis ad forum ecclesiasticum noscitur pertinere.* And the principal cause is right of tithes, and the plea of *Modo decimandi* sounds in satisfaction of tithes; and therefore the consufance of the original cause, (*scil.*) the right of tithes appertaining to them, the consufance of the bar of tithes, which he said was but the necessary, and as it were dependent upon it, appertained also to them. And whereas it is said in the Bishop of Winchester's case, in the Second Part of my Reports, and 8 E. 4. 14. that they would not accept of any plea in discharge of tithes in the spiritual court, he said, that they would allow such pleas in the spiritual court, and commonly had allowed them; and therefore he said, that *that* was the mystery of iniquity founded upon a false and feigned foundation, and humbly desired the reformation of that error, for they would allow *Modum decimandi* being duly proved before them.

2 Co. 43, 44,
&c.

Note.

2. There was great inconveniency, that laymen should be triers of their own customs, if a *Modus decimandi* should be tried by jurors; for they shall be upon the matter jurors (*i. e.* Judges) in their own cause.

Post. 58.
Antea 12, 14.

3. That the custom *De modo decimandi* is of ecclesiastical jurisdiction and consufance, for it is a manner of tithing, and all manner of tithing belongs to ecclesiastical jurisdiction: and therefore he said, that the Judges, in their answer to certain objections made by the Archbishop of Canterbury, have confessed, that suit may be had in spiritual courts *pro modo decimandi*; and therefore the same is of ecclesiastical consufance; and by consequence it shall be tried before the ecclesiastical Judges: for if the right of tithes be of ecclesiastical consufance, and the satisfaction also for them of the same jurisdiction, the same shall be tried in the ecclesiastical court.

4. In

Part XIII. and of Prohibitions, debated, &c.

4. In the prohibitions of *Modus decimandi* averment is taken, that although the plaintiff in the prohibition offereth to prove *Modum decimandi*, the ecclesiastical court doth refuse to allow of it, which was confessed to be a good cause of prohibition: but he said, they would allow the plea *De modo decimandi* in the spiritual court, and therefore *cessante causa cessabit & effectus*, and no prohibition shall lie in the case.

Averment.
Antea 14.
Post. 44.

5. He said, that he can shew many consultations granted in the cause *De modo decimandi*, and a consultation is of greater force than a prohibition; for consultation, as the word imports, is made by the court with consultation and deliberation. And Bacon, Solicitor-general, being (as it is said) assigned with the clergy by the King, argued before the King, and in effect said less than Dr. Bennet said before; but he vouched 1 R. 3. 4. the opinion of Hussey, when the original ought to begin in the spiritual court, and afterwards a * thing cometh in issue which is triable in our law, yet it shall be tried by their law: as if a man sueth for a horse devised to him, and the defendant saith, that the devisor gave to him the said horse, the same shall be tried there. And the Register 57 and 58. If a man be condemned in expences in the spiritual court for laying violent hands upon a Clerk, and afterwards the defendant pays the costs, and gets an acquittance, and yet the plaintiff sueth him against his acquittance for the costs, and he obtains a prohibition, for that acquittances and the deeds are to be determined in our law, yet he shall have a consultation, because that the principal belongeth to them, 38 E. 3. 5. Right of tithes between two spiritual persons shall be determined in the ecclesiastical court. And 38 E. 3. 6. where the right of tithes comes in debate between two spiritual persons, the one claiming the tithes as of common right within his parish, and the other claiming to be discharged by real composition, the ecclesiastical court shall have jurisdiction of it.

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And thereupon the said Judges made humble suit to the King, that forasmuch as they perceived that the King in his princely wisdom did detest innovations and novelties, that he would vouchsafe to suffer them with his gracious favour, to inform him of one innovation and novelty which they conceived would tend to the hindrance of the good administration and execution of justice within his realm.

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Your

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Your Majesty, for the great zeal which you have to Justice, and for the due administration thereof hath constituted and made fourteen Judges, to whom you have committed not only the administration of ordinary justice of the realm, but *crimina læsæ Majestatis*, touching your royal person for the legal proceeding: also in Parliament we are called by writ, to give to your Majesty and to the Lords of the Parliament our advice and counsel, when we are required: we two Chief Justices sit in the Star-chamber, and are oftentimes called into the Chancery, Court of Wards, and other high courts of justice: we in our circuits do visit twice in the year your realm, and execute justice according to your laws; and if we who are your public Judges receive any diminution of such reverence and respect in our places, which our predecessors had, we shall not be able to do you such acceptable service as they did, without having such reverence and respect as Judges ought to have. The state of this question is not in *statu deliberativo*, but in *statu judiciali*; it is not disputed *de bono* but *de vero, non de lege fienda, sed de lege latâ*; not to frame or devise new laws, but to inform your Majesty what your law of England is: and therefore it was never seen before, that when the question is of the law, that your Judges of the law have been made disputants with him who is inferior to them, who day by day plead before them at their several courts at Westminster: and although we are not afraid to dispute with Mr. Bennet and Mr. Bacon, yet this example being *primæ impressionis*, and your Majesty detesting novelties and innovations, we leave it to your grace and princely consideration, whether your Majesty will permit our answering *in hoc statu judiciali*, to this charge upon your public Judges of the realm? But in obedience to your Majesty's command, we, with your Majesty's gracious favour, in most humble manner will inform your Majesty touching the said question, which we, and our predecessors before us, have oftentimes adjudged upon judicial proceedings in your courts of justice at Westminster: which judgments cannot be reversed or examined for any error in law, if * not by a writ of error in a more high and supreme court of justice, upon legal and judicial proceedings: and that is the ancient law of England, as appeareth by the statute of 4 H. 4. cap. 22.

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And we being commanded to proceed; all that which was said by us, the Judges, was to this effect: that the trial *De modo decimandi* ought to be by the common law

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law by a jury of twelve men, it appeareth in three manners of proof: first, by the common law: secondly, by act of Parliament: and lastly, by infinite judgments and judicial proceedings long times past without any impeachment or interruption.

But first it is to see, what is a *Modus decimandi*? *Modus decimandi* is, when lands, tenements, or hereditaments have been given to the Parson and his successors, or an annual certain sum, or other profit always, time out of mind, to the Parson and his successors, in full satisfaction and discharge of all the tithes in kind in such a place; and such manner of tything is now confessed by the other party to be a good bar of the tithes in kind.

Modus decimandi.
See Watson's
Clergyman,
509, &c.

2. That *Modus decimandi* shall be tried by the common law, that is, that all satisfactions given in discharge of tithes, shall be tried by the common law: and therefore put that which is the most common case; that the lord of the manor of Dale prescribes to give to the Parson 40s. yearly, in full satisfaction and discharge of all tithes growing and renewing within the manor of Dale, at the feast of Easter: the Parson sueth the lord of the manor of Dale for his tithes of his manor in kind, and he in bar prescribes in manner *ut supra*: the question is, if the lord of the manor of Dale may upon that have a prohibition, for if the prohibition lieth, then the spiritual court ought not to try it; for the end of the prohibition is, that they do not try that which belongs to the trial of the common law; the words of the prohibition being, that they would draw the same *ad aliud examen*.

First, the law of England is divided into common law, statute-law, and customs of England; and therefore the customs of England are to be tried by the trial which the law of England doth appoint.

Custom to repair a church-yard wall, &c. triable at common law, Carthew 33. 34.

Secondly, prescriptions by the law of the holy church, and by the common law, differ in the times of limitation; and therefore prescriptions and customs of England shall be tried by the common law. See 20 H. 6. fol. 17. 19 E. 3. Jurisdiction 28. The Bishop of Winchester brought a writ of annuity against the Archdeacon of Surry, and declared, how that he and his ancestors were seised by the hands of the defendant by title of prescription, and the defendant demanded judgment, if the court would hold jurisdiction being between spiritual persons, &c. Stone. Justice: be assured, that upon title of prescription we will here hold jurisdiction; and upon that, Wilby Chief Justice gave the rule, answer over: upon which it follows, that if a *Modus decimandi*, which

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See Carthew 33,
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is an annual sum for tithes by prescription, comes in debate between spiritual persons, that the same shall be tried here: for the rule of the book is general, (*scil.*) upon title of prescription, we will hold jurisdiction, and that is fortified with an asseveration, *know assuredly*; as if he should say, that it is so certain, that it is without question. 32 E. 3. Jurisd. 26. There was a Vicar who had only tithes and oblations, and an Abbot claimed an annuity or pension of him by prescription: and it was adjudged, that the same * prescription, although it was betwixt spiritual persons, should be tried by the common law. *Vide* 22 H. 6. 46 and 47. A prescription, that an Abbot time out of mind had found a Chaplain in his chapel to say divine service, and to minister sacraments, tried at the common law.

3. See the record of 25 H. 3. cited in the case of *Modus decimandi* before; and see Register fol. 38. when lands are given in satisfaction and discharge of tithes.

4. See the statute of *circumspecte agatis, decimæ debitæ, seu consuetæ*, which proves that tithes in kind, and a *Modus*, by custom, &c. differ.

5. 8 E. 4. 14. and F. N. B. 41 G. a prohibition lieth for lands given in discharge of tithes. 28 H. 3. 97. a. There suit was for tithes, and a prohibition lieth, and so abridged by the book, which of necessity ought to be upon matter *De modo decimandi*, or discharge.

6. 7 E. 6. 79. If tithes are sold for money, by the sale the things spiritual are made temporal, and so in the case *De modo decimandi*, 42 E. 3. 12. agrees.

7. 22 E. 3. 2. Because an appropriation is mixt with the temporality, (*scil.*) the King's letters patent, the same ought to be shewed how, &c. otherwise of that which is mere temporal: and so it is of real composition, in which the patron ought to join. *Vide* 11 H. 4. 85. Composition by writing that the one shall have the tithes, and the other shall have money, the suit shall be at the common law.

Secondly, by acts of Parliament.

1. The said act of *circumspecte agatis*, which giveth power to the ecclesiastical Judge to sue for tithes due first in kind, or by custom, *i. e.* *Modus decimandi*: so as by authority of that act, although that the yearly sum foundeth in the temporality, which was paid by custom in discharge of tithes, yet because the same cometh in the place of tithes, and by constitution, the tithes are changed into money, and the Parson hath not any remedy
for

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for the same, which is the *Modus decimandi* at the common law; for that cause the act is clear, that the same was a doubt at the common law: and the statute of *Articuli Cleri*, cap. 1. If corporal penance be changed in *pœnam pecuniariam*, for that pain suit lieth in the spiritual court: for see *Mich. 8. Hen. 3. Rot. 6. in Thesaur.* A prohibition lieth *pro eo quod Rector de Chesterton exigit de Hugone de Logis de certâ portione pro decimis molendinarum*; so as it appeareth, it was a doubt before the said statute, if suit lay in the spiritual court *De modo decimandi*. And by the statute of 27 Hen. 8. cap. 20. it is provided and enacted, that every of the subjects of this realm, according to the ecclesiastical laws of the church, and after the laudable usages and customs of the parish, &c. shall yield and pay his tithes, offerings, and other duties: and that for subtraction of any of the said tithes, offerings, or other duties, the Parson, &c. may by due process of the King's ecclesiastical laws, convent the person offending before a competent Judge, having authority to hear and determine the right of tithes, and also to compel him to yield the duties, *i. e.* as well *Modus decimandi*, by laudable usage or custom of the parish, as tithes in kind: and with that in effect agrees the statute of 32 H. 8. cap. 7. By the statute of 2 E. 6. c. 13. it is enacted, that every of the King's subjects shall from henceforth, truly and justly, without fraud or guile, divide, &c. and pay all manner of their predial tithes in their proper kind, as they rise * and happen in such manner and form as they have been of right yielded and paid within 40 years next before the making of this act. or of right and custom ought to have been paid. And after, in the same act, there is this clause and proviso, Provided always, and be it enacted, that no person shall be sued, or otherwise compelled to yield, give, or pay any manner of tithes for any manors, lands, tenements, or hereditaments, which by the laws and statutes of this realm, or by any privilege or prescription, are not chargeable with the payment of any such tithes, or that be discharged by any compositions real. And afterwards, there is another branch in the said act: And be it further enacted, that if any person do subtract or withdraw any manner of tithes, obventions, profits, commodities, or other duties before mentioned (which extends to customs of tithing, *i. e.* *Modus decimandi*, mentioned before in the act, &c.) that then the party so subtracting, &c. may be convented and sued in the King's ecclesiastical court, &c. And upon the said branch, which is the negative, that no person shall be sued for any tithes of any lands which

Prohibition.
Antea 8, &c.
17, &c.
Post. 70.
Post. 47, &c.

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are not chargeable with the payment of such tithes by any law, statute, privilege, prescription, or real composition. And always when an act of Parliament commands or prohibits any court, be it temporal or spiritual, to do any thing temporal or spiritual if the statute be not obeyed, a prohibition lieth: as upon the statute *De articulis super Cartas*, cap. 4. *Quod Communia Placita non tenentur in Scaccario*: a prohibition lieth to the court of Exchequer, if the Barons hold a common plea there, as appeareth in the Register 187. b. So upon the statute of *Westm. 2. quod inquisitiones quæ magnæ sunt examinationis non capiantur in patriâ*; a prohibition lieth to the Justices of *Nisi prius*. So upon the statute of *Articuli super Cartas*, cap. 7. *Quod Constabularius Castr. Dover, non teneat placitum forinsecum quod non tangit custodiam castrî*, Register 185. So upon the same statute, cap. 3. *Quod Senescallus & Mariscallus non teneant placita de libero tenemento, de debito, conventionem, &c.* a prohibition lieth 185. And yet by none of these statutes, is any prohibition or *Superfedeas* given by expresse words of the statute. So upon the statutes 13 R. 2. cap. 3. 15 R. 2. cap. 2. 2 H. 4. cap. 11. by which it is provided, that Admirals do not meddle with any thing done within the realm, but only with things done upon the seas, &c. a prohibition lieth to the court of Admiralty. So upon the statute of *Westm. 2. cap. 43. against Hospitalers and Templars*, if they do against the same statute, Regist. 39. a. So upon the statute *de prohibitionem regiâ, ne laici ad citationem Episcopi conveniant ad recognitionem faciend' vel sacrament' præstanda nisi in casibus matrimonialibus & testamentariis*, a prohibition lieth Regist. 36. b. And so upon the † statute of 2 H. 5. cap. 3. at what time the libel is grantable by the law, that it be granted and delivered to the party without difficulty, if the ecclesiastical Judge, when the cause which depends before him is mere ecclesiastical, denieth the libel, a prohibition lieth, because *that* he doth is against the statute; and yet no prohibition by any expresse words is given by the statute. And upon the same statute the case was in 4 E. 3. 37. Pierce Peckham took letters of administration of the goods of Rose Brown of the Bishop of London, and afterwards T. T. sued to Thomas Archbishop of Canterbury, that because the said Rose Brown had goods within his diocese, he prayed letters of administration to be committed to him, upon which, the Bishop granted him letters of administration, and afterwards * T. T. libelled in the spiritual court of the Archbishop in the Arches against Pierce Peckham, to whom the Bishop of London had com-

See Lib. Entr. 450. a prohibition was upon the statute that one shall not maintain; and so upon every penal law. See F. N. B. 39. B. Prohibition to the Common Pleas upon the stat. of Magna Charta that they do not proceed in a writ of *Præcipe in Capite*, where the land is not holden of the King. 1 & 2 Eliz. Dy. 170, 171. Prohibition upon the statute of *Parren Land*, and Peat is only prohibited by implication. † See 12 Co. 61, &c. *ibid.*

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mitted letters of administration to repeal the same: and Pierce Peckham, according to the said statute, prayed a copy of the libel exhibited against him, and could not have it, and thereupon he sued a prohibition, and upon that an attachment: and there Catesby Serjeant, moved the court, that a prohibition did not lie, for two causes: 1. That the statute gives that the libel shall be delivered, but doth not say that the plea in the spiritual court shall surcease by prohibition. 2. The statute is not intended of matter mere spiritual, as that case is, to try the prerogative and the liberty of the Archbishop of Canterbury and the Bishop of London, in committing of administrations. And there Danby Chief Justice, If you will not deliver the libel according to the statute, you do wrong, which wrong is a temporal matter, and punishable at the common law; and therefore in this case the party shall have a special prohibition out of this court, reciting the matter, and the statute aforesaid, commanding them to surcease, until he had the copy of the libel delivered unto him: which case is a stronger case than the case at bar, for that statute is in the affirmative, and the said act of 2 E. 6. cap. 13. is in the negative, *scil.* that no suit shall be for any tithes of any land in kind where there is *Modus decimandi*, for that is the effect of the said act, as to that point. And always after the said act, in every term in the whole reigns of King Edward. 6. Queen Mary, and Queen Elizabeth, until this day, prohibitions have been granted *in causâ Modi decimandi*, and judgments given upon many of them, and all the same without question made to the contrary. And accordingly all the Judges resolved in 7 E. 6. Dyer 79. *Et contemporanea expositio est optima & fortissima in lege, & a communi observantia non est recedendum, & minime mutanda sunt quæ certam habuerunt interpretationem.*

Note.

See 2 Inst. 648, to 664.

And as to the first objection, that the plea of *Modus decimandi* is but accessory to the right of tithes; it was resolved, that the same was of no force, for three causes.

A Modus extinguishes tithes in kind.

Ansea 13, 14, 16.

1. In this case, admitting that there is a *Modus decimandi*, then by the custom, and by the act of 2 E. 6. and the other acts, the tithes in kind are extinct and discharged; for one and the same land cannot be subject to two manner of tithes, but the *Modus decimandi* is all the tithe with which the land is chargeable: as if a horse or other thing valuable be given in satisfaction of the duty, the duty is extinct and gone: and it shall be intended, that the *Modus decimandi* began at the first by real composition, by which the lands were discharged of the tithes, and a yearly sum in satisfaction of them assigned

signed to the Parson, &c. So as in this case there is neither principal or accessory, but an identity of the same thing.

2. The statute of 2 E. 6. being a prohibition in itself, and that in the negative, if the ecclesiastical Judge doth against it, a prohibition lieth, as it appeareth clearly before.

3. Although that the rule be general, yet it appeareth by the Register itself, that a *Modus decimandi* is out of it; for there is a prohibition *in causâ Modi decimandi* when lands are given in satisfaction of the tithes.

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As to the second objection, it was answered and resolved, that *that* was from, or out of the question; for *status questionis non est * deliberativus sed judicialis*, not what was fit and convenient, but what the law is: and yet it was said, it shall be more inconvenient to have an ecclesiastical Judge, who is not sworn to do justice, to give sentence in a case between a man of the clergy and a layman, than for twelve men sworn to give their verdict upon hearing of witnesses *viva voce*, before an indifferent Judge, who is sworn to do right and justice to both parties: but convenient or inconvenient is not the question: also they have in the spiritual court such infinite exceptions to witnesses, that it is at the will of the Judge with which party he shall give his sentence.

As to the third objection, it was answered and resolved. First, that *satisfactio pecuniaria* of itself is temporal: but forasmuch as the Parson hath not remedy *pro Modo decimandi* at the common law, the Parson by force of the act cited before might sue *pro Modo decimandi* in the ecclesiastical court: but that doth not prove, that if he sueth for tithes in kind, which are utterly extinct, and the land discharged of them, that upon the plea *De modo decimandi* a prohibition should not lie, for that without all question it appeareth by all *that* which before hath been said, that a prohibition doth lie. See also 12 H. 7. 24. b. Where the original cause is the spiritual, and they proceed upon a temporal, a prohibition lieth. See 39 E. 3. 22 E. 4. Consultation, that right of tithes which is merely ecclesiastical, yet if the question ariseth of the limits of a parish, a prohibition lieth: and this case of the limits of a parish was granted by the Lord Chancellor, and not denied by the other side.

Antea 14, 33.

As to the fourth objection, that an averment is taken of the refusal of the plea *De modo decimandi*; it was answered and resolved, that the same is of no force for divers causes.

I. It

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1. It is only to inforce the contempt.

2. If the spiritual court ought to have the trial *De modo decimandi*, then the refusal of acceptance of such a plea should give cause of appeal, and not of prohibition: as if an excommunication, divorce, heresy, simony, &c. be pleaded there, and the plea refused, the same gives no cause of prohibition: as, if they deny any plea, a mere spiritual appeal, and no prohibition lieth.

See the Proem to Gibson's Codex, and the Codex, p. 703, 735. Watson's Clergyman, ch. 54, 55, 56, and p. 586.

3. From the beginning of the law, no issue was ever taken upon the refusal of the plea in *Causâ Modi decimandi*, nor any consultation ever granted to them, because they did not refuse, but allowed the plea.

4. The refusal is no part of the matter issuable or material in the plea; for the same is no part of the suggestion which only is the substance of the plea: and therefore the *Modus decimandi* is proved by two witnesses, according to the statute of 2 E. 6. cap. 13. and not the refusal; which proveth, that the *Modus decimandi* is only the matter of the suggestion, and not the refusal.

5. All the said five matters of discharge of tithes mentioned in the said branch of the act of 2 E. 6. being contained within a suggestion, ought to be proved by two witnesses, and so have been always from the time of the making of the said act; and therefore the statute of 2 E. 6. clearly intended, that prohibitions should be granted in such causes.

6. Although that they would allow *bona fide de Modo decimandi*, without refusal, yet if the Parson sueth there for tithes in kind, when the *Modus* is proved, the same being expressly prohibited by the * act of 2 E. 6. a prohibition lieth, although the *Modus* be spiritual, as appeareth by the said book of 4 E. 4. 37. and other the cases aforesaid.

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And afterwards, in the third day of debate of this case before his gracious Majesty, Dr Bennet and Dr. Martin had reserved divers consultations granted in *causâ Modi decimandi*, thinking that those would make a great impression in the opinion of the King: and thereupon they said, that consultations were the judgments of courts had upon deliberation, whereas prohibitions were only granted upon surmises: and they shewed four precedents:

Third day's debate.

One, where three jointly sued a prohibition in the case of *Modi decimandi*, and the consultation saith, *pro eo quod suggestio materiaque in eadem contenta minus sufficiens in lege existit, &c.*

2. Another in *causâ Modi decimandi*, to be paid to the Parson or Vicar.

3. Where

The Case DE MODO DECIMANDI. Part XIII.

3. Where the Parson sued for tithes in kind, and the defendant alledged *Modus decimandi* to be paid to the Vicar.

The fourth, where the Parson libelled for tithe-wool, and the defendant alleged a custom, to reap corn, and to make it into sheaves, and to set forth the tenth sheaf at his charges, and likewise of hay, to sever it from the nine cocks at his charge, in full satisfaction of tithes of the corn, hay, and wool.

To which I answered, and humbly desired the King's Majesty to observe that these have been reserved for the last, and centre point of their proof: and by them your Majesty shall observe these things:

1. That the King's courts do them justice, when with their consciences and oaths they can.

2. That all the said cases are clear in the judgment of those who are learned in the laws, that consultation ought by the law to be granted.

For as unto the first precedent, the case upon their own shewing appeareth to be, three persons joined in one prohibition for three several parcels of land, each of which had a several manner of tithing; and for that cause they could not join, when their interests were several; and therefore a consultation was granted.

As to the second precedent, the manner of tithing was alleged to be paid to the Parson or Vicar, which was altogether uncertain.

As to the third precedent, the *Modus* never came in debate, but whether the tithes did belong to the Parson or Vicar? Which being betwixt two spiritual persons, the ecclesiastical court shall have jurisdiction: and therewith agreeth 38 E. 3. 6. cited before by Bacon: and also there the Prior was of the order of the Cisterians; for if the tithes originally belonged to the Parson, any recompence for them shall not bar the Parson.

As to the last precedent, the same was upon the matter of a custom of *Modus decimandi* for wool: for to pay the tithe of corn or hay in kind, in satisfaction of corn, hay, and wool, cannot be a satisfaction for the wool, for the other two were due of common right; and all this appeareth in the consultations themselves, which they shew, but understand not. To which the Bishop of London said, that the words of the consultation were, *Quod suggestio præd' materiaque in eadem contentâ minus sufficiens in lege existit, &c.* so as *materia* cannot be referred to form, and therefore it ought to extend to the *Modus decimandi*.

* To

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* To which I answered, that when the matter is insufficiently or uncertainly alleged, the matter itself faileth; for matter ought to be alleged in a good sentence: and although the matter be in truth sufficient, yet if it were insufficiently alleged, the plea wanteth matter. And the Lord Treasurer said openly to them, that he admired that they would allege such things which made more against them than any thing which had been said. And when the King relied upon the said prohibition in the Register, when land is given in discharge of tithes, the Lord Chancellor said, that *that* was not like to this case; for there, by the gift of the land in discharge of tithes, the tithes were actually discharged: but in the case *De modo decimandi*, an annual sum is paid for the tithes, and the land remains charged with the tithes, but ought to be discharged by plea *De modo decimandi*: all which was utterly denied by me; for the land was as absolutely discharged of the tithes *in casu de modo decimandi*, when an annual sum ought to be paid, as where land is given: for all the records and precedents of prohibitions in such cases are, that such a sum had been always, &c. paid *in plenam contentationem, satisfactionem & exonerationem omnium & singularum decimarum, &c.* And although that the sum be not paid, yet the Parson cannot sue for tithes in kind, but for the money: for, as it hath been said before, the custom and the said acts of Parliament (where there is a lawful manner of tithing) hath discharged the lands from tithes in kind, and prohibited, that no suit shall be for them. And although that now (as it hath been said) the Parsons, &c. may sue in the spiritual court *Pro modo decimandi*, yet without question, at the first, the annual payment of money was as temporal, as annual profits of lands were: all which the King heard with much patience. And the Lord Chancellor answered not to that which I answered him in, &c.

And after that his most excellent Majesty, with all his Council, had for three days together heard the allegations on both sides, he said that he would maintain the law of England, and that his Judges should have as great respect from all his subjects as their predecessors had had: and for the matter, he said, that for any thing that had been said on the part of the clergy, that he was not satisfied: and advised us his Judges to confer amongst ourselves, and that nothing be encroached upon the ecclesiastical jurisdiction, and that they keep themselves within their lawful jurisdiction, without unjust vexation and molestation done to his subjects, and without delay or hindering of justice. And this was the end of these three days consultations.

And

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Gibson's Codes
700.
Watson's Cler-
gyman 552 to
588.

Note.

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And note, that Dr. Bennet in his discourse inveighed much against the opinion in 8 E. 4. 14. and in my Reports in Wright's case, that the ecclesiastical Judge would not allow a *Modus decimandi*; and said, that *that* was the mystery of iniquity, and that they would allow it. And the King asked, for what cause it was so said in the said books? To which I answered, that it appeared in Linwood, who was Dean of the Arches, and of so profound knowledge in the canon and civil law, and who wrote in the reign of King Henry VI. a little before the said case in 8 E. 4. in his title *De decimis, cap. Quoniam propter, &c. fol. 139. b. Quod decimæ solvantur, &c. absque ulla diminutione*: and in the Gloss it is said, *Quod consuetudo de non decimando, aut de non bene decimando non valet*. And that being written by a great canonist of England, was the cause of the said saying in 8 E. 4. that they would not allow the said plea *De modo decimandi*; for always the *Modus decimandi* is less in value than the tithes in specie, and then the same is against their canon; *Quod decimæ solvantur absque diminutione, et quod consuetudo de non plene decimando non valet*. And it seemed to the King, that that book was a good cause for them in the time of King Edward IV. to say, as they had said; but I said, that I did not rely upon that, but upon the grounds aforesaid, (*scil.*) the common law, statute laws, and the continual and infinite judgments and judicial proceedings; and that if any canon or constitution be against the same, such canon and constitution, &c. is void by the statute of 25 H: 8. c. 19. which see and note: for all canons, constitutions, &c. against the prerogative of the King, the common laws, statutes, or customs of the realm, are void.

Lastly, the King said, that the high commission ought not to meddle with any thing but *that* which is enormous and exorbitant, and cannot permit the ordinary process of the ecclesiastical law; and which the same law cannot punish. And that was the cause of the institution of the same commission, and therefore, although every offence, *ex vi termini*, is enormous, yet in the statute it is to be intended of such an offence, as is *extra omnem normam*, as heresy, schism, incest, and the like great offences: for the King said, that it was not reason that the high commission should have consufance of common offences, but to leave them to ordinaries, *scil.* because that the party cannot have an appeal in case the high commission shall determine of it. And the King thought that two high commissions, for either province one, should be sufficient for all England, and no more.

Bedell

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Antea 13, 15, 17.

Antea 17.

Note.

High commission.

Antea 9, 10.

12 Co. 51 to 55.

84 to 89.

Gibson's Codex

50, 54, 56, 58,

59, &c.

(16) Bedell and Sherman's Case.

Mich. 39 & 40 Elizabeth.

In the King's Bench.

MICH. 39 & 40 Eliz. which is entered Mich. 40 Eliz. in the Common Pleas, Rot. 699. Cantabr. the case was this; Robert Bedell, Gent. and Sarah his wife, farmers of the rectory of Litlington in the county of Cambridge, brought an action of debt against John Sherman, in the custody of the Marshal of the Marshalsea, and demanded 550l. and declared, that the Master and Fellows of Clare-hall in Cambridge, were seised of the said rectory in fee, in right of the said college, and in June 10, 29 El. by indenture demised to Christopher Pheasant the said rectory for twenty-one years, rendering 17l. 15s. 5d. and reserving rent-corn according to the statute, &c. which rent was the ancient rent, who entered into the said rectory, and was possessed, and assigned all his interest thereof to one Matthew Batt, who made his last will and testament, and made Sarah his wife his executrix, and died; Sarah proved the will, and entered, and was thereof possessed as executrix, and took to husband the said Robert Bedell, by force whereof, they in the right of the said Sarah entered, and were possessed thereof; and that the defendant was then tenant, and seised for his life of 300 acres of arable lands in Litlington aforesaid, which ought to pay tithes to the Rector of Litlington; and in *anno* 38 El. the defendant *grano seminavit* 200 acres, parcel, &c. And that the tithes of the same did amount to 150l. and that the defendant did not divide nor set forth the same from the nine parts, but took and carried them away, against the form and effect * of the statute of 2 E. 6, &c. And the defendant pleaded *nihil debet*, and the jury found that the defendant did owe 55l. and to the residue they found *nihil debet*, &c. and in arrest of judgment, divers matters were moved.

Subtraction of
tithes.
Gibson's Codex
718, &c. 326.
antea 23.

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1. That *grano feminata* is too general and uncertain, but it ought to be expressed with what kind of corn the same was sowed.

Antea 24.
2 Dany. 223.

2. It was moved, if the Parson ought to have the treble value, the forfeiture being by express words limited to none by the act, or that the same did belong to the Queen.

3. If the same did belong to the Parson, if he ought to sue for the same in the ecclesiastical court, or in the King's temporal court.

4. If the husband and wife should join in the action, or the husband alone should have the action, and upon solemn argument at the bar and at the bench, the judgment was affirmed.

(17) JOHN BAILIE's Case.

Trin. 7 Jac. 1.

In the Court of Wards.

Diem clausit extremum.
12 Co. 102.
3 Co. 168.

IT was found by writ of *Diem clausit extremum*, that the said John Bailie was seised of a messuage or tenement, and of and in the fourth part of one acre of land, late parcel of the demesne lands of the manor of Newton, in the county of Hereford, in his demesne as of fee, and found the other points of the writ, and it was holden by the two Chief Justices, and the Chief Baron.

1 Salk. 169.

1. That *messuagium, vel tenementum*, is uncertain; for *tenementum* is *nomen collectivum*, and may contain land, or any thing which is holden.

Post, 50, 72.

2. It was holden, that it was void for the whole, because that no town is mentioned in the office where the messuage or tenement, or the fourth part of the acre lieth; and from the visne of the manor upon a traverse none can come, because it is not affirmed by the office, that they are parcel of the manor, but *nuper* parcel of the manor, which implieth, that now they are not, and it was holden by them, that no *Melius inquirendum* shall issue forth, because that the whole office is uncertain and void.

3 Co. 168.
Post, 72.

(18) COVENANTS

(18) COVENANTS to USES.

Trin. 7 Jac. 1.

In the Court of Wards.

THE Attorney of the court of Wards moved the two Chief Justices and Chief Baron in this case, that a man seised of lands in fee simple, covenants for the advancement of his son, and of his name, and blood, and posterity, that he will stand seised of them, to the use of himself for the term of his life, and after to the use of his eldest son, and to such a woman which he shall marry, and to the heirs males of the body of the son, and afterwards the father dieth, and after the son taketh a wife and dieth; if the wife shall take an estate for life, and the doubt was, because the wife of the son was not within the considerations, and the use was limited to one who was capable, *scil.* the son, and to another who was not capable, and therefore the son should take an estate in tail executed. But it was resolved by the said two Chief Justices and Chief * Baron, that the wife should take well enough; and as to the first reason, they resolved, that the wife was within the consideration, for the consideration was for the advancement of his posterity; and without a wife, the son cannot have posterity: also when the wife of the son is sure of a jointure, the same is for the advancement of the son, for thereby he shall have the better marriage. And as to the second, it was resolved, that the estate of the son shall support the use to the defendant; and when the contingent happeneth, the estate of the son shall be changed according to the limitation, *scil.* to the son and the woman, and the heirs of the body of the son: and so it was resolved in the King's Bench by Popham Chief Justice, and the whole court of the King's Bench, in the reign of Queen Elizabeth, in Sheffield's case, for both points.

4 Mod. 153.
2 Salk. 675 to
979.
1 Vent. 137,
138, &c.
Of uses. Vide
post. 50, 55.
Parliament
Cases 104.

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(19) SPARY's Case.

Trin. 7 Jac. 1.

In the Court of Wards.

Office. Mesne
Profits, vide in-
fra.

3 Inst. 216.

4 Inst. 196, 197,
297, 200, 207.

4 Co. 54.

7 Co. 21.

8 Co. 138.

10 Co. 114, 115.

JOHN SPARY seised in fee in the right of his wife of lands holden of the crown by knight's-service, had issue by her, and 22 Decemb. *anno* 9 Eliz. aliened to Edward Lord Stafford; the wife died, the issue of full age, the lands continue in the hands of the alienee, or his assigns; and ten years after the death of the father, and twelve years after the death of the mother, office is found, 7 *Jacobi*, finding all the special matter after the death of the mother: the question was, whether the mesne profits are to be answered to the King? And it was resolved by the said two Chief Justices and the Chief Baron, that the King should not have the mesne profits, because that the alienee was *in* by title; and until entry the heir hath no remedy for the mesne profits, but that the King might seise and make a livery, because that the entry of the heir is lawful by the the statute of 32 H. 8.

(20) The Earl of CUMBERLAND's Case.

Trin. 7 Jac. 1.

In the Court of Wards.

Office, &c.

3 Inst. 216.

4 Inst. 196, 197,
200.

Vide supra, &c.

2 Co. 93, 94.

3 Co. 31, 34, 66.

6 Co. 76.

8 Co. 164, 165,

173.

9 Co. 126, 132.

10 Co. 80, 81, &c.

IT was found by force of a *Mandamus*, at Kendal in the county of Westmoreland, the twenty-first of December, 6 *Jacobi Regis*, that George Earl of Cumberland, long before his death, was seised in tail to him and to the heirs males of his body, of the castles and manors of Browham, Appleby, &c. the remainder to Sir Ingram Clifford, with

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with divers remainders over in tail; the remainder to the right heirs of Henry Earl of Cumberland, father of the said George; and that the said George, Earl, so seised by fine and recovery, conveyed them to the use of himself and Margaret his wife for their lives, for the jointure of the said Margaret; and afterwards to the heirs males of the body of George Earl of Cumberland. and for want of such issue, to the use of Francis now Earl of Cumberland. and to the heirs males of his body begotten; and for want of such issue, to the use of the right heirs of the said George; and afterwards, by another indenture, conveyed the fee simple to Francis, Earl; by force of which, and of * the statute of uses they were seised accordingly: and afterwards, 30 Octob. anno 3 Jacobi, the said George Earl of Cumberland died without heir male of his body lawfully begotten: and further found, that Margaret, Countess of Cumberland, that now is, was alive, and took the profits of the premises from the death of the said George Earl of Cumberland. until the taking of that inquisition; and further found the other points of the writ. Page [50]

And first it was objected, that here was no dying seised found by office, and therefore the office shall be insufficient: but as to *that*, it was answered and resolved, that by this office the King was not intitled by the common law, for then a dying seised, or at least a dying (seisin) the day of his death was necessary; but this office is to be maintained upon the statutes of 32 & 34 H. 8. by force of which no dying seised is requisite, but rather the contrary, *scil.* if the land be (as this case is) conveyed to the wife, &c. And so it was resolved in Vincent's case, anno 23 Eliz. where all the lands holden *in capite*, was conveyed to the younger son, and yet the eldest son was in ward, notwithstanding that nothing descended. Vide post. 71.
ant. 48.
Stat. 32 H. 8. c. 1.
& 34 H. 8. c. 5.
Sec 2 Co. 93, 94.
&c.

The second objection was, It doth not appear that the estate of the wife continued in her until the death of the Earl, for the husband and wife had aliened the same to another; and then no primer seisin shall be, as it is agreed in Bingham's case.

As to that, it was answered and resolved, that the office was sufficient *prima facie* for the King, because it is a thing collateral, and no point of the writ; and if any such alienation be (which shall not be intended) then the same shall come *in* of the other part of the alienee by a *Monstrans de droit*; and the case at bar is a stronger case, because it is found, that the said Countess took the profits of the premises from the death of George the Earl, until the finding of the office. See 1 Co. 50, 53;
158, 173.
4 Co. 54, &c.
7 Co. 10, &c.

(21) W I L L S ' s Case.

Trin. 7 Jac. 1.

In the Court of Wards.

Uses.
 1 Co. 121, 127,
 140.
 2 Co. 57, 58.
 6 Co. 64.
 7 Co. 13 & 14.
 Vide ant. 48.
 post. 55, 56.

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HENRY WILLS, being seised of the fourth part of the manor of Wryland in the county of Devon, holden of Queen Elizabeth in socage-tenure *in capite*, of the said fourth part enfeofed Zachary Irish and others, and their heirs, to the use of the said Henry for the term of his life, and afterwards to the use of Tho. Wills his second son in tail; and afterwards to the use of Rich. Wills his youngest son in tail; and for default of such issue, to the use of the right heirs of the said Henry; and afterward the said Henry so seised as abovesaid died thereof seised, William Wills being his son and heir of full age; Thomas the second son entered as into his remainder: all this matter is found by office, and the question was, if the King ought to have primer seisin in this case, and that livery or *ouster le main* shall be sued in this case by the statutes of 32 and 34 H. 8. And it was resolved by the two Chief Justices and the Chief Baron, that not; if in this case by the common law no livery or *ouster le main* shall be sued; and that was agreed by them all by the experience and course of the court. See 21 Eliz. Dyer, 362. If tenant in socage dieth seised in * possession, his heir within the age of fourteen years, he shall not sue livery, but shall have an *Ouster le main, una cum exitibus*; but otherwise it is, if the heir be of the age of fourteen years, which is his full age for socage; and therewith agreeth 4 Eliz. Dyer 213.

And two precedents were shewed, which were decreed in the same court by the advice of the Justices assistants to the court.

One in Trinity term, 16 Elizabeth, Thomas Stavely the father enfeofed William Strelly, and Thomas Law of the

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the manor of Ryndly in the county of Nottingham, upon condition that they re-enseoff the feoffor and his wife for their lives, the remainder to Thomas Stavely son and heir apparent of the feoffor in fee, which manor was holden of Queen Elizabeth in socage *in capite*: and upon consideration of the saving in the statute of 32 H. 8. next after the clause concerning tenure in socage in chief, it was resolved, that no livery or *Ouster le main* should be sued in such case, and the reason was, because that the precedent clause giveth liberty to him who holdeth in socage in chief, to make disposition of it, either by act executed, or by will at his free will and pleasure: and before the said act, no livery or *Ouster le main* should be sued in such case: and the words of the saving are, saving, &c. to the King, &c. all his right, &c. of primer seisin and relief, &c. fortenure in socage, or of the nature of tenure in socage in chief, as heretofore hath been used and accustomed: but there was no use or custom before the act, that the King should have any primer seisin or relief in such case: and the words subsequent in the said saving depend upon the former words, and do not give any primer seisin or relief where none was before.

Another precedent was in Pasch. 37 Eliz. in the Book of Orders, fol. 444. where the case was, that William Allet was seised of certain lands in Pitsey called Lundsey, holden of the Queen in socage in chief, and by deed covenanted to stand seised to the use of his wife for life, and afterwards to the use of Richard his younger son in fee, and died, his heir of full age; and all *that* was found by office, and it was resolved, *ut supra*, that no livery or *Ouster le main* should be sued in that case; but the doubt in the case at bar was, because that Henry the feoffor had a reversion in fee, which descended to the said William his eldest son.

(22) The Case of the Admiralty.

Trin. anno 7 Jac. 1.

Admiralty.
 See 12 Co. 129.
 &c. ibid.
 2 Co. 93.
 10 Co. 115, 117.
 5 Co. 2.

A BILL was preferred in the Star-chamber against Sir Richard Hawkins, Vice-admiral of the county of Devon; and it charged, that one William Hull and others were notorious pirates upon the high seas, and shewed in certain, what piracy they had committed: the said Sir Richard Hawkins knowing the same, did them receive, abet and comfort within the body of the county, and for bribes and rewards suffered them to be discharged. And what offence *that* was, the court referred to the consideration of the two Chief Justices, and the Chief Baron, who heard counsel of both sides divers days at Serjeants Inn.

12 Co. 129.

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And first, it was by them resolved, that by the common law the Admirals ought not to meddle with any thing done within the realm. but only with things done upon the sea; and that appeareth fully by * the statute of 13 R. 2. cap. 5. by which it appeareth, that such was the common law in the time of King Edward the third, and therewith agreeth the statute of 2 Hen. 4. cap. 11. and the statute of 15 Hen. 4. cap. 13. That because the Admirals and their deputies in-croach to themselves divers jurisdictions and franchises more than they ought to have, Be it enacted, that all contracts, pleas, and complaints, and all other things arising within the bodies of the counties as well by land as by water, as also of wreck of the sea, the Admiral court shall not have any conusance, power, or jurisdiction, &c. Nevertheless of the death of a man, and of mayhem done in great ships, being in the main stream of great rivers, only below the bridges nigh to the sea, and not in o-

Part XIII. The Case of the ADMIRALTY.

ther places of the same rivers ; and to arrest ships in the great flotes for the great voyage of the King and of his realm : and by the stat. of 2 Hen. 5. cap. 6. the Admirals of the King of England have done and used reasonably, according to the ancient law and custom, upon the main sea. See the statute of 5 Eliz. cap. 5. And all this appeareth to be by the common law ; and with that agreeth Stamford, fol. 51. And if a man be killed or slayed within the arms of the sea, where a man may see from one part of the land to the other, the Coroner shall inquire of it, and not the Admiral, because that the country may well know it: and he voucheth 8 Ed. 2. Coron. 399. so saith Stamford, the same proves that by the common law before the statute of 2 H. 4. cap. 11. the Admiral shall not have jurisdiction unless upon the high sea. See Plow. Com. 37. 6. If the Marshal holdeth plea out of the verge of the Admiral within the body of the county, the same is void. See 2 R. 3. 12. 30 H. 6. 6. by Prisot.

2. It was resolved, that the said statutes are to be intended of a power to hold plea, and not of a power to award execution, *scil. De jurisdictione tenendi placiti ; non de jurisdictione exequendi* : for notwithstanding the said statutes, the Judge of the Admiralty may do execution within the body of the county ; and therefore in 19 Hen. 6. 7. the case was, W. T. at Southwark affirmed a plaint of trespass in the court of Admiralty before the Steward of the Earl of Huntingdon against J. B. of a trespass done upon the high sea, upon which issued a citation to cite the said J. B. to appear before the Steward aforesaid at the common day then next ensuing, directed to P. who served the said citation ; at which day the said J. B. made default: and the usage of the court is, that if the defendant maketh default, he shall be amerced by the discretion of the Steward, to the use of the plaintiff: to which J. B. for his default aforesaid, was amerced to twenty marks ; whereupon command was made to the said P. as Minister of the court aforesaid, to take the goods of the said J. B. to make agreement with the beforesaid W. T. by force of which he for the said twenty marks took five cows, and an hundred sheep, in execution for the money aforesaid, in the county of Leicester. And there it is holden by Newton, and the whole court, that the statutes restrain the power of the court of Admiralty

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ralty to hold plea of a thing done within the body of the county, but they do not restrain the execution of the same court to be served upon the land: for it may be that the party hath not any thing upon the sea, and then it is reason to have it upon the land: and if such a defendant have nothing wherewithal to make agreement, they of the court have power to take the body of such a defendant upon the land in execution.

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* In which case these points were observed:

1. Although that the court of Admiralty is not a court of record, because they proceed there according to the civil law, (see Brook Error, 77. acc.) yet by custom of the court they may amerce the defendant for his default by their discretion.

2. That they may make execution for the same of the goods of the defendant *in corpore comitatûs*: and if he hath not goods, then they may arrest the body of the defendant within the body of the county.

See this point
solved 8 Eliz.
Dyer per curiam,
which is omitted
out of the print-
ed book.

But the great question between them was, If a man committed piracy upon the sea, and one knowing thereof, receiveth and comforteth the defendant within the body of the county; if the Admiral and other the Commissioners, by force of the act of 28 H. 8. cap. 16. may proceed by indictment and conviction against the receiver and abettor, inasmuch as the offence of the accessory hath his beginning within the body of the county?

And it was resolved by them, that such a receiver and abettor by the common law could not be indicted or convicted, because that the common law cannot take consue of the original offence, because *that* is done out of the jurisdiction of the common law: and by consequence, where the common law cannot punish the principal, the same shall not punish any one as accessory to such a principal. And therefore Coke, Chief Justice reported to them a case which was in Suffolk in *anno* 28 *Eliz.* where Butler and others upon the sea, next to the town of Laystoft, in Suffolk, robbed divers of the Queen's subjects, and spoiled them of their goods, which goods they brought into Norfolk; and there they were apprehended, and there brought before me, then a Justice of the Peace within the same county, whom I examined; and in the end they confessed a cruel and barbarous piracy, and that those goods which then they had with them, were part of the goods which they had robbed from the Queen's subjects upon the high sea: and I was of opinion, that in that case it could not be felony punishable by the common law, because that the original act, (*scil.*) the taking of them

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them was not any offence whereof the common law taketh knowledge; and by consequence, the bringing of them into a county could not make the same felony punishable by our law: and it is not like, where one stealeth goods in one county, and brings them into another, there he may be indicted of felony in any of the counties, because that the original act was felony, whereof the common law taketh knowledge: and yet notwithstanding I committed them to the gaol, until the coming of the Justices of Assises. And at the next assises the opinion of Wray Chief Justice, and Periam Justice of Assise, was, that forasmuch as the common law doth not take notice of the original offence, the bringing of the goods stolen upon the sea into a county, did not make the same punishable at the common law: and thereupon they were committed to Sir Robert Southwell, then Vice-Admiral of the said counties: and this in effect agrees with Lacy's case, which see in my Reports cited in Bingham's case in the Second Report, 93. and in Constable's case, Third Report, 107.

See that piracy was felony, the book of 40 Assis. 25. by Schard, where a Norman Master or Captain of a ship, together with some Englishmen, robbed the King's subjects upon the seas; where he saith, that it was felony in the Norman Captain, and treason in the Englishmen his companions: and the reason of the said case was, because the Normans were not then under the obedience and allegiance of the King * of England (for King John lost Normandy) and for that cause piracy was but felony in the Norman; but in the English, who were under the obedience and allegiance of the King of England, the same was adjudged treason, which is to be understood of petit treason, which was high treason before: and therefore in that case, the pirate being apprehended, the Norman Captain was hanged, and the Englishmen were hanged and drawn, as appeareth by the same book. See Stamford 10.

And some objected, and were of opinion, that treasons done out of the realm might have been here determined by the common law; but truly the same could not be punishable, but only by the civil law before the Admiral, or by act of Parliament, as all foreign treasons and felonies were by the common law: and therefore where it is declared by the stat. of 25 E. 3. that adherence to the enemies of the King within England, or elsewhere, is treason, the same shall be tried by the common law: but where it is done out of the realm, the offender should not be attainted but by Parliament, until the statute of 35 Hen. 8. cap. 2. although that there are opinions

Note, The Admiral's jurisdiction is founded on the Lex Regia, whereby the King is bound to defend and protect his subjects by sea, &c. and this by the common law, which to that end gave him a more extensive power at sea than on the land; and therefore all the ports of the kingdom were originally the King's demesnes.

PETTUS and GODSALVE's Case. Part XIII.

ons in some books to the contrary. See 5 R. 2. *Quare impedit*, &c.

[Note, All crimes are local, and must be tried where committed. See Rep. Q. A. p. 9.]

(23) Pettus and Godfolve's Case.

Trin. 7 Jac. I.

In the Common Pleas.

Fine, proclamations amended.

4 Co. 42.

See 5 Co. 2.

Part 28, 39, 43, 44, & 45.

8 Co. 157, to 161.

IN a fine levied Trinity term, *anno quinto* of this King, between John Pettus, Esq. plaintiff, and Roger Godfolve and others, deforcients of the manor of Castre, with the appurtenances, &c. in the county of Norfolk, where in the third proclamation upon the foot of the same fine the said proclamation is said to have been made in the sixth year of the King that now is, which ought to have been made *anno quinto* of the King: and whereas upon the foot of the same fine, the fourth proclamation is altogether left out; but because upon the view of the proclamations upon *dorsis*, upon the record, & *notæ finis ejusdem termini per Justiciarios*, remaining with the Chirographer, and the book of the said Chirographer, in which the said proclamations were first entered, it appeareth, that the said proclamations were rightly and duly made, therefore it was adjudged, that the errors or defects aforesaid should be amended, and made to agree as well with the proclamation upon record of the said fine, and entry of the said book, as with the other proclamations *in dorsis super pedes aliorum finium* of the same term: and this was done upon the motion of Haughton, Serjeant at Law.

(24) SAMMES's

(24) S A M M E S's Case.

Mich. 7 Jac. 1.

In the Court of Wards.

JOHNSAMMES being seised of Grany Mead by copy of court roll of the manor of Tolleshham the Great, of which Sir Thomas Beckingham was lord, and held the same of the King by knight's service *in capite*; Sir Thomas by his deed indented, dated the 22d of December, in the * first year of King James, made between him of the one part, and the said John Sammes and George Sammes son and heir apparent of the said John of the other part, did bargain, sell, grant, enfeoff, release, and confirm unto the said John Sammes the said mead called Grany Mead, to have and to hold the said mead unto the said John Sammes and George Sammes, and their heirs and assigns, to the only use and behoof of the said John Sammes and George Sammes, their heirs and assigns for ever: and by the same indenture Sir Thomas did covenant with John and George, to make further assurance to John and George, and their heirs, to the use of them and their heirs, and livery and seisin was made and delivered, according to the true intent of the said indentures, of the within mentioned premises to the uses within mentioned.

Uses.
See 1 Co. 107,
121, 122, 127,
140.
2 Co. 58, 78.
6 Co. 64.
7 Co. 13.
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Vide ant. 50, 51.
Uses. Vide ant.
48, 50, 54.

John Sammes the father dieth, George Sammes his son and heir being within age, the question was, Whether George Sammes should be in ward to the King or no? And in this case three points were resolved:

Wardship.

1. Forasmuch as George was not named in the premises, he cannot take by the *Habendum*; and the livery made according to the intent of the indenture, doth not give any thing to George, because the indenture as to him is void: but although the feoffment be good only to John and his heirs, yet the use limited to the use of John and George, and their heirs, is good.

Habendum.

2. If

Uses.

Joint-tenants,
&c.

2. If the estate had been conveyed to John and his heirs by the release and confirmation, as it well may be to a tenant by copy of court-roll, the *use* limited to them is good: for upon a release which creates an estate, a use may be limited, or a rent reserved without question; but upon a release or confirmation, which enures by way of *mitter le droit*, an use cannot be limited, or a rent reserved.

But the third was of greater doubt, if in this case the father and son were joint-tenants, or tenants in common? For it was objected, when the father is only enfeoffed to the only use of him and his son, and their heirs in the *per*, that in this case, they shall be tenants in common. By the feoffment the father is *in* by the common law in the *per*, and then the limitation of the use to him and his son, and to their heirs, cannot divest the estate, which was vested in him by the common law, out of him, and vest the estate in him in the *Post* by force of the statute, according to the limitation of the use; and therefore, as to one moiety, the father shall be *in* by force of the feoffment in the *per*, and the son, as to the other moiety, shall be *in* by force of the statute, according to the limitation of the use in the *post*, and by consequence they shall be tenants in common. But it was answered and resolved, that they were joint-tenants, and that the son in the case at bar should have the said grange by the survivor: for if at the common law A. had been enfeoffed to the use of him and B. and their heirs, although that he was only seised of the land, the use was jointly to A. and B. For a use shall not be suspended or extinct by a sole seisin, or joint seisin of the land: and therefore if A. and B. be enfeoffed to the use of A. and his heirs, and A. dieth, the entire use shall descend to his heir: as it appears in 13 H. 7. 6. in Stoner's case: and by the statute of 27 H. 8. cap. 10. of uses, it appeareth, that when several persons are seised to the use of any of them, that the estate shall be executed according to the use.

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And as to *that* which was said, that the estate of the land which the father hath in the land, as to the moiety of the use which he himself * hath, shall not be divested out of him: to *that* it was answered and resolved, that *that* shall well be: for if a man maketh a feoffment in fee to one, to the use of him and the heirs of his body; in this case, for the benefit of the issue, the statute according to the limitation of the uses, divests the estate vested in him by the common law, and executes the same in

Part XIII.

SAMMES'S Case.

in himself by force of the statute; and yet the same is out of the words of the statute of 27 H. 8. which are, where any person, &c. stand or be seised, &c. to the use of any other person; and here he is seised to the use of himself: and the other clause is, where divers and many persons, &c. be jointly seised, &c. to the use of any of them, &c. and in this case A. is sole seised: but the stat. of 27 H. 8. hath been always beneficially expounded, to satisfy the intention of the parties, which is the direction of the use according to the rule of the law. So if a man, seised of lands in fee-simple, by deed covenants with another, that he and his heirs will stand seised of the same land, to the use of himself and the heirs of his body, or unto the use of himself for life, the remainder over in fee; in that case, by the operation of the statute, the estate which he hath at the common law is divested, and a new estate vested in himself, according to the limitation of the use. And it is to be known, that an use of land (which is but a pernancy of the profits) is no new thing, but part of that which the owner of the land had: and therefore, if tenant in borough English, or a man seised of the part of his mother, maketh a feoffment to another without consideration, the younger son in the one case, and the heir on the part of the mother on the other, shall have the use, as they should have the land itself, if no feoffment had been made: as it is holden in 5 E. 4. 7. See 4 & 5 Phil. & Mar. Dyer 163. So if a man maketh a feoffment unto the use of another in tail, and afterwards to the use of his right heirs, the feoffor hath the reversion of the land in him; for if the donee dieth without issue, the law giveth the use, which was part of the land to him: and so it was resolved, Trinity, 31 Eliz. between Fenwick and Milford in the King's Bench. So in 28 H. 8. Dyer 11. the Lord Rosse's case: a man seised of one acre by priority, and of another acre by posteriority, and make a feoffment in fee of both to his use: and it was adjudged, that although both pass at one instant, yet the law shall make a priority of the uses, as if it were of the land itself: which proves, that the use is not any new thing, for then there should be no priority in the case. See 13 H. 7. b. by Butler.

So in the case at bar, the use limited to the feoffee and another, is not any new thing, but the pernancy of the old profits of the land, which well may be limited to the feoffee and another jointly: but if the use had been only limited to the feoffee and his heirs, there, because there is not any limitation to another person, *nec in presenti,*

See the Duke of
Norfolk's case in
3 Chan. Ca.

senti, nec in futuro, he shall be *in* by force of the feoffment.

And it was resolved, that joint-tenants might be seised to an use, although that they come to it at several times: as, if a man maketh a feoffment in fee to the use of himself, and to such a woman, which he shall after marry, for term of their lives, or in tail, or in fee; in this case, if after he marrieth a wife, she shall take jointly with him, although that they take the use at several times, for they derive the use out of the same fountain and freehold, *sc.* the first feoffment. See 17 El. Dyer 340. So if a disseisin be had to the use of two, and one of them agreeth at one time, and the other at another time, they shall * be joint-tenants; but otherwise it is of estates which pass by the common law: and therefore, if a grant be made by deed to one man for term for life, the remainder to the right heirs of A. and B. in fee, and A. hath issue and dieth, and afterwards B. hath issue and dieth, and then the tenant for life dieth; in that case the heirs of A. and B. are not joint tenants, nor shall join in a *Scire facias* to execute the fine, 24 E. 3. Joinder in Action 10 because that although the remainder be limited by one fine, and by joint words, yet because that by the death of A. the remainder as to the moiety, vested in his heir, and by the death of B. the other moiety vested in his heir at several times, they cannot be joint tenants: but in the case of a use, the husband taketh all the use in the mean time; and when he marrieth, the wife takes it by force of the feoffment and the limitation of the use jointly with him, for there is not any fraction and several vesting by parcels, as in the other case, and such is the difference. See 18 E. 3. 28. And upon the whole matter it was resolved, that because in the principal case the father and son were joint-tenants by the original purchase, that the son having the land by survivor, should not be in ward: and accordingly it was so decreed.

(25) COLLINS and HARDING's Case.

S. l. v. 140. a. 140. a.

Pasch. 39 Eliz. Rot. 233.

In the King's Bench.

THE case between Collins and Harding was; a man seized of lands in fee, and also of lands by copy of court-roll in fee, according to the custom of the manor, made one entire demise of the lands in fee, and of the lands holden by copy according to the custom, to Harding for years, rendering one entire rent: and afterwards the lessor surrendered the copyhold land to the use of Collins and his heirs: and at another time granted by deed the reversion of the freehold lands to Collins in fee, and Harding attorned; and afterwards for the rent behind, Collins brought an action of debt for the whole rent: and it was objected, that the reservation of the rent was an entire contract, and by the act of the lessee the same cannot be apportioned: and therefore if one demiseth three acres, rendering 3s. rent, and afterwards bargaineth and selleth, by deed indented and inrolled, the reversion of one acre, the whole rent is gone, because that the contract is entire and cannot be severed by the act of the lessor: also the lessee by *that* shall be subject to two fealties, where he was subject but to one before.

Rent apportion-
ed.
See 3 Co. 24.
4 Co. 37, 38.
5 Co. 2. Part
5, 6, 55.
6 Co. 2.
7 Co. 23.
8 Co. 79.
9 Co. 135.
10 Co. 128.

As to these points, it was answered and resolved, that the contract was not entire, but that the same by the act of the lessor, and the assent of the lessee, might be divided and severed: for the rent is incident to the reversion, and the reversion is severable, and by consequence the rent also: for *accessarium sequitur naturam sui principalis*, and *that* cannot be severed or divided by the assent of the lessee, or express attornment, or implied by force of an act of Parliament, to which every one is a party as by force of the statute of inrolments, or of uses, &c. And as to the two fealties, to *that* the lessee shall be subject, although that the rent shall be extinct: for fealty is by
neces-

necessity of law incident to the reversion, and to every part of it; but the rent shall be divided *pro ratâ portionis*: and so it was adjudged.

* And it was also adjudged, that although Collins cometh to the reversion by several conveyances, and at several times, yet he might bring an action of debt for the whole rent. Hil. 43 Eliz. Rot. 243. West. and Laffel's case: a man made a lease for years of certain lands, and afterwards deviseth the reversion of two parts to one, he shall have two parts of the rent; and he may have an action of debt for the same, and have judgment to recover, Hil. 42 Eliz. Rot. 108. in the Common Pleas, Ewen and Moyle's case: the devisee of the reversion of part shall avow for part of the rent, and such avowry shall be good and maintainable.

Note well these cases and judgments, for they are given upon great reason and consideration, for otherwise great inconvenience would ensue, if by severance of part of the reversion, the entire rent should be lost: and the opinion reported by Serjeant Bendloes, in Hil. 6. and 7 E. 6. to the contrary, *nihil valet (scil.)* that the rent in such case should be lost, because that no contract can be apportioned, which is not law: for, 1. A rent reserved upon a lease for years is more than a contract, for it is a rent-service. 2. It is incident to the reversion which is severable. 3. Upon recovery of part in waste, or upon entry in part for a forfeiture, or upon surrender of part, the rent is apportionable.

(26) De Modo Decimandi.

Modus decim.
antea 12, 37,
38, &c.

NOTE, it was adjudged 19 Eliz. in the King's Bench, that where one obtained a prohibition upon prescription *De modo decimandi*, by payment of a certain sum of money at a certain day; upon which issue was taken, and the jury found the *Modus decimandi* by payment of the said sum, but that it had been paid at another day: and the case was well debated, and at the last it was resolved, that no consultation should be granted; for although that the day of payment be mistaken, yet it appeareth to the court, that no tithes in kind were due, for which the
fuit

Part XIII. Ejectment *De duabus partibus, &c.*

suit was in the spiritual court: and the trial of the custom *De modo decimandi* belongeth to the common law, and a consultation shall not be granted where the spiritual court hath not jurisdiction of the cause: Tanfield, Chief Baron, hath the report of this case.

(27) Ejectment *De duabus partibus, &c.*

Mich. 7 Jac. 1.

IN an *Ejectione firmæ*, the writ and declaration were of two parts of certain lands in Hetherfet and Windham in Norfolk, and doth not say in two parts, in three parts to be divided; and yet it was good as well in the declaration as in the writ: for without question the writ is good, *De duabus partibus*, generally, and so is the Register. See 4 E. 3. 162. 2 E. 3. 31. 2 Aff. 1. 10 Aff. 12. 10 E. 3. 511. 11 Aff. 21. 11 E. 3. Bre. 478. 9 H. 6. 36. 17 E. 4. 46. 19 E. 3. Bre. 244. And upon all the said books it appeareth, that by the intendment and construction of the law, when any parts are demanded without shewing in how many parts the whole is divided, that there remains but one part not divided: as if two parts are demanded, there remains a third part; and when three parts are divided, there remains a fourth part, &c. But when any demand is of other parts in other form, there he ought to shew the same specially: as if one demandeth three parts of * five parts, or four parts of the six, &c. And according to this difference it was so resolved in Jourden's case in the King's Bench: and accordingly judgment was given in this term in the case at bar.

See 3 Co. 16, 45.
4 Co. 26, 46.
9 Co. 77, 78.
10 Co. 46.
11 Co. 25, 55.
&c.

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(28) MUTTON's Case.

Mich. 7 Jacobi 1.

In the Common Pleas.

Slander.

Postea 71.

1 Danv. 95, to 99.

See Inst. Leg.

291, 292.

1 Lev. 255, 276.

2 Brownl. 276.

Hob. 137, 155,

162.

1 Cro. 100.

2 Cro. 205, 233,

236, 306, 399,

531, 560.

AN action upon the case was brought against Mutton, for calling the plaintiff, "forcerer and inchanter," who pleaded not guilty; and it was found-against him to the damages of 6d. And it was holden by the whole court in the Common Pleas, that no action lieth for the said words: for *sortilegium est rei futuri per sortes exploratio: et sortilegus sive sortilegista est qui per sortes futura prænunciat*. Inchantry *est verbis aut rebus adjunctis aliquid præter naturam moliri*: whereof the poet saith,

Carminibus Circes socios mutavit Ulyssis.

See 45 E. 3. 17. One was taken in Southwark with the head and visage of a dead man, and with a book of forcery in his mail: and he was brought into the King's Bench before Knevet Justice, but no indictment was framed against him: for which the Clerks made him swear, that he should never after commit any forcery, and he was sent to prison: and the head and the book were burned at Tuthil, at the charges of the prisoner. And the ancient law was, as it appeareth by Britton, that those who were attainted of forcery were burned: but the law is not such at this day; but he who is convicted of such imposture and deceit shall be fined and imprisoned. And it was said, that it was adjudged, that if one calleth another witch, that an action will not lie, for it is too general: *et dicitur Latine venefica*: but if one saith, she is a witch, and hath bewitched such a one to death, an action upon the case lieth, if in truth he be dead. Conjuracion is derived of these words, *con* and *juro*: *et proprie dicitur quando multi in alicujus perniciem jurant*: and in the statute of 5 Elizabeth, cap. 16. it is taken for invocation of

Part XIII. SIR ALLEN PERCY's Case.

of any evil and wicked spirits, *i. e. est conjurare verbis conceptis alios malos & iniquos spiritus*; the same is made felony: but witchcraft, enchantment, charm, or sorcery, is not felony, if by them any person be not killed or dieth. So that conjuration *est verbis conceptis compellere malos & iniquos spiritus aliquod facere vel dicere, &c.* But a witch, who works any thing by an evil spirit, doth not make any conjuration or invocation by any powerful names of the devil, but the wicked spirit comes to her familiarly, and therefore it is called a familiar: but if a man be called a conjurer, or a witch, he shall not have any action upon the case, unless that he saith, that he is a conjurer of the devil, or of any evil or wicked spirit: or, that one is a witch, and that he hath bewitched any one to death, as is before said.

And note, that the first statute which was made against conjuration, witchcraft, sorcery, and enchantment, was the act of 33 H. 8. c. 8. and by it they were made felony in certain cases special, but that act was repealed by the statute of 1 E. 6. cap. 12. and it seems all the former stat. against witchcraft are now repealed.

(29) Sir ALLEN PERCY's Case.

* *Mich. 7 Jacobi i.*

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In the Court of Wards.

SIR John Fitz and Bridget his wife, being tenants for life of a tenement called Ramshams, the remainder to Sir John Fitz in tail, the remainder to Bridget in tail, the reversion to Sir John and his heirs: Sir John and Bridget his wife, by indenture demised the said tenement to William Sprey for divers years yet to come, except all trees of timber, oak and ash, and liberty to carry them away, rendering rent; and afterwards Sir John died, having issue Mary his daughter, now the wife of Sir Allen Percy, Knt. and afterwards the said Wm. Sprey demised the same tenement to Sir Allen for 7 years: the question was, whether Sir Allen, having the immediate inheritance in the right of his wife, expectant upon the

Waste in cutting trees, &c.

See 2 Co. 92,

4 Co. 63, 67,

to 70.

5 Co. 2. Part 22.

11 Co. 45, 48,

82.

Sir ALLEN PERCY's Case. Part XIII.

5 Co. 12.

estate for the life of Bridget, and also having the possession by the said demise, might cut down the timber-trees, oaks, and ashes: and it was objected, that he might well do it: for it was resolved in Saunders's case, in the Fifth Part of my Reports, fol. 12. That if lessee for years, or for life, assigns over his term or estate unto another, excepting the mines, or the trees, or the clay, &c. that the exception is void, because that he cannot except that which he cannot lawfully take, and which doth not belong unto him by the law. But it was answered and resolved by the two Chief Just. and the Ch. Baron, that in the case at bar, the exception was good without question, because that he who hath the inheritance, joins in the lease with the lessee for life. And it was further resolved, that if tenant for life leaseth for years, excepting the timber-trees, the same is lawfully and wisely done: for otherwise, if the lessee or assignee cutteth down the trees, the tenant for life should be punished in waste, and should not have any remedy against the lessee for years: and also if he demiseth the land without exception, he who hath the immediate estate of inheritance, by the assent of the lessee, may cut down all the timber-trees, which when the term ended, all should be wasted, and then the tenant for life should not have the boots which the law giveth him, nor the pawnage and other profits of the said trees, which he lawfully might take: but when tenant for life upon his lease excepteth the trees, if they be cut down by the lessor, the lessee or assignee shall have an action of trespass, *Quare vi et armis*, and shall recover damages according to his loss.

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And this case is not like the said case of Saunders, which was affirmed to be good law; for there, the lessee assigned over his whole interest, and therefore could not except the mines, trees, and clay, &c. which he had not but as things annexed to the land: and therefore he could not have them when he had parted with his whole interest, nor he could not take them either for reparations or otherwise: but when tenant for life leaseth for years, except the timber-trees, the same remaineth yet annexed to his freehold, and he may command the lessee to take them for necessary reparations of the houses. And in the said case of Saunders, a judgment is cited between Foster and Miles * plaintiffs, and Spencer and Bourd defendants, that where lessee for years assigns over his term, except the trees, that waste in such case shall be brought against the assignee, but in this case without question waste lieth

Part XIII. H U L M E's Case.

lieth against the tenant for life, and so there is a difference, &c.

(30) H U L M E's Case.

Mich. 7 Jacobi 1.

In the Court of Wards.

TH E King (in the right of his Duchy of Lancaster) Lord : Richard Hulme (seised of the manor of Male in the county of Lancaster, holden of the King as of his Duchy by knight's service) mesne; and Robert Male, (seised of lands in Male, holden of the mesne as of the said manor by knight's service) tenant. Richard Hulme died; after whose death, 31 H. 8. it was found, that he died seised of the said mesnalty, and that the same descended to Edward his son and heir within age, and found the tenure aforesaid, &c. And during the time that he was within age, Robert Male the tenant died; after which, *anno 35 H. 8.* it was found by office, that Robert Male died seised of the said tenancy peravail, and that the same descended to Richard his son and heir within age, and that the said tenancy was holden of the King, as of his said Duchy, by knight's service; whereas in truth the same was holden of Edward Hulme, then in ward of the King, as of his mesnalty: for which the King seised the ward of the heir of the tenant. And afterwards, *anno quarto Jacobi Regis* that now is, after the death of Richard Male, who was lineal heir of the said Robert Male, by another office it was found, that the said Richard died seised of the said tenancy, and held the same of the King as of his Duchy, by knight's service, his heir within age, whereupon Richard Hulme, cousin and heir of the said Richard Hulme, had preferred a bill to be admitted to his traverse of the said office found in 4 *Jac. Regis*: and the question was, whether the office found in 35 H. 8. be any estoppel to the said Hulme, to traverse the said last office? Or if that the said Hulme should be driven first to traverse the office of 35 H. 8.

Traverse of
office.
See 4 Co. 43,
55 to 59.
6 Co. 8.
7 Co. 44, 45.
8 Co. 168.

And it was objected, that he ought first to traverse the office of 35 H. 8. as in the first case of 26 E. 3. 65. That if two fines be levied of lands in ancient demesne, the lord of whom the land is holden ought to have a writ of deceit to reverse the first fine; and in *that* the second fine shall not be a bar: and that the first office shall stand as long as the same remains in force.

To which it was answered and resolved by the two Chief Justices and the Chief Baron, and the court of Wards, that the finding of an office is not any estoppel, for that is but an inquest of office, and the party grieved shall have a traverse to it, as it hath been confessed, and therefore without question the same is no estoppel; but when an office is found falsely, that land is holden of the King by Knight's service *in capite*, or of the King himself in socage, if the heir sueth a general livery, now it is holden in 46 E. 3. 12. by Mowbray and Persey, that he shall not after add, that the land is not holden of the * King; but there is not any estoppel to the heir himself who sueth the livery, and shall not conclude his heir: for so saith Mowbray himself expressly in 44 Aff. pl. 35. That an estoppel by suing of livery shall estop only the heir himself during his life: and in 1 H. 4. 6. b. there the case is put of express confession and suing of livery by the issue in tail upon a false office: and there it is holden, that the jurors upon a new *Diem clausit extremum*, after the death of such special heir, are at large, according to their conscience, to find that the land is not holden, &c. for they are sworn *ad veritatem dicendum*: and their finding is called *veredictum, quasi dictum veritatis*; which reason also shall serve; when the heir in fee-simple sueth livery upon a false office, and the jurors after his death ought to find according to the truth: so it is said 33 H. 6. 7. by Laicon, that if two sisters be found heirs, whereof the one is a bastard, if they join in a suit of livery, she which joineth with the bastard in the livery, shall not allege bastardy in the other: but there is no book that saith, that the estoppel shall endure longer than during his life: and when livery is sued by a special heir, the force and effect of the livery is executed and determined by his death, and by *that* the estoppel is expired with the death of the heir; but *that* is to be intended of a general livery: but a special livery shall not conclude one: but as it is expressed, the words of a general livery are; when the heir is found of full age: *Rex eschaetori, &c. Scias quod cepimus homagium J. filii & hæredis B. defuncti de omnibus terris & tenementis quæ idem B. pater tuus tenuit*

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Co. Lit. 77. a.

Co. Lit. 226. a.

de

de nobis in capite, die quo obiit, & ei terras & tenement' illa reddidimus, ideo tibi præcipimus, &c. And when the heir was in ward, at his full age, the writ of livery shall say, *Rex, &c. Quia J. filius & hæres B. defuncti qui de nobis tenuit in capite ætatem suam coram te sufficienter probavit, &c. Ceperimus homagium ipsius J. de omnibus terres et tenementis, quæ idem B. pater suus tenuit de nobis in capite die quo obiit, & ei terras et tenement' illa reddidimus, et ideo tibi præcipimus, ut supra, &c.* Which writ is the suit of the heir, and therefore although that all the words of the writ are the words of the King, as all the writs of the King are; and although that the livery be general, *de omnibus terris & tenementis de quibus B. pater J. tenuit de nobis in capite die quo obiit*, without direct affirmation that any manor in particular is holden *in capite*, and notwithstanding that the same is not at the prosecution of the King's writ, and no judgment upon it; yet because the general livery is founded upon the office, and by the office it was found, that divers lands or tenements were holden of the King *in capite*, for this cause the suing of the writ shall conclude the heir only which sueth the livery, and after his death the jurors in a new writ of *Diem clausit extremum*, are at large, as before is said. And if that jury find falsly in a tenure of the King also, the lord of whom the land is holden may traverse that office: or if land be holden of the King, &c. in socage, the heir may traverse the last office, for by *that* he is grieved only; and he shall not be driven to traverse the first office: and when the father sueth livery, and dieth, the conclusion is executed and past, as before is said. And note, that there is a special livery, but that proceeds of the grace of the King, and is not the suit of the heir, and the King may grant it either at full age, before *ætate probanda*, &c. or to the heir within age, as it appeareth in 21 E. 3. 40. And that is general, and shall not comprehend any tenure, as the general livery doth, and therefore it is not any * estoppel without question. And at the common law, a special livery might have been granted before any office found: but now by the statute of 33 H. 8. cap. 22. it is provided, that no person or persons, having lands or tenements above the yearly value of 20l. shall have or sue any livery, before inquisition or office found, before the escheator or other commission: but by an express clause in the same act, livery may be made of the lands and tenements comprised or not comprised in such office; so that if office be found of any parcel, it is sufficient: and if the land in the office doth exceed 20l. then

the heir may sue a general livery after office thereof found, as is aforesaid: but if the land doth not exceed 5l. by the year, then a general livery may be sued without office by warrant of the Master of the Wards, &c. See 23 Eliz. Dyer 177. That the Queen *ex debito justitiæ* is not bound at this day, after the said act of 33 Hen. 8. to grant a special livery; but it is at her election to grant a special livery, or to drive the heir to a general livery.

It was also resolved in this case, that the office of 35 Hen. 8. was not traversable, for his own traverse shall prove, that the King had cause to have wardship by reason of ward: and when the King cometh to the possession by a false office, or other means, upon a pretence of right, where in truth he hath no right, if it appeareth that the King hath any other right or interest to have the land there, none shall traverse the office or title of the King, because that the judgment in the traverse is, *ideo consideratum est, quod manus domini Regis a possessione amoveantur*, &c. which ought not to be, when it appeareth to the court, that the King hath right or interest to have the land, and to hold the same accordingly. See 4 Hen. 4. fol. 33. in the Earl of Kent's case, &c.

(31) PARLIAMENT.

Mich. 7 Jacobi I.

See Hale of Parliaments 159, 198, &c.
Bohun's Collection 268 to 289.
See Faref. I 3, &

NOTE, the privilege, order, or custom of Parliament, either of the Upper House, or of the House of Commons, belongs to the determination or decision only of the court of Parliament: and this appeareth by two notable precedents.

The one at the Parliament holden in the 27th year of King Henry the sixth, there was a controversy moved in the Upper House between the Earls of Arundel and of Devonshire, for their seats, places, and pre-eminences of the same, to be had in the King's presence, as well in the high court of Parliament, as in his Councils, and elsewhere: the King, by the advice of the Lords Spiritual and Temporal, committed the same to certain Lords of Parliament, who for that they had no leisure to examine the

*See 4. Inst.
262.*

Part XIII. PARLIAMENT.

the same, it pleased the King, by the advice of the Lords at his Parliament, *anno* 27 of his reign, that the Judges of the land should hear, see, and examine the title, &c. and to report what they conceive herein: the Judges made report as followeth; that this matter, (*viz.* of honour and precedency between the two Earls, Lords of Parliament) was a matter of Parliament, and belongs to the King's Highness, and the Lords Spiritual and Temporal in Parliament, by them to be decided and determined; yet being thereto so commanded, they shewed what they found upon examination, and their opinions thereupon.

Another Parliament in 31 H. 6. which Parliament began the 6th * of March, and after it had continued some time, it was prorogued until the 14th of February: and afterwards in Michaelmas term, *anno* 31 Hen. 6. Thomas Thorp, the Speaker of the Commons House, at the suit of the Duke of Buckingham, was condemned in the Exchequer in 1000l. damages for a trespass done to him: the 14th of February, the Commons moved in the Upper House, that their Speaker might be set at liberty, to exercise his place: the Lords refer this case to the Judges; and Fortescue and Prisot, the two Chief Justices, in the name of all the Judges, after sad consideration and mature deliberation had amongst them, answered and said, that they ought not to answer to this question, for it hath not been used aforetime, that the Justices should in any wise determine the privilege of this high court of Parliament; for it is so high and mighty in its nature, that it may make laws; and that, *that* is law, it may make no law: and the determination and knowledge of that privilege belongeth to the Lords of the Parliament, and not to the Justices: but as for proceedings in the lower courts in such cases, they delivered their opinions. And in 12 E. 4. 2. in Sir John Paston's case, it is holden, that every court shall determine and decide the privileges and customs of the same court, &c.

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See Bohun's
Parliamentary
Debates 276,
277.

Lucas R. 412.
Lex Parliam.
cap. 2 & 3, &c.

(32) HEYWARD and Sir JOHN
WHITBROKE's Case.*Hil. 7 Jacobi 1.*

In the Star-Chamber.

Star-chamber
jurisdiction, &c.
See 12 Co. 84,
90.
4 Inst. 60.

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IN the case between Heyward and Sir John Whitbroke in the Star-chamber, the defendant was convicted of divers misdemeanors, and fine and imprisonment imposed upon him, and damages to the plaintiff: and it was moved that a special process might be made out of that court to levy the said damages upon the goods and lands of the defendant: and it was referred to the two Chief Justices, whether any such process might be made? Who this term moved the case to the Chief Baron, and to the other Judges and Barons; and it was unanimously resolved by them, that no such process could or ought to be made, neither for the damages nor for the costs given to the plaintiff: for the court hath not any power or jurisdiction to do it, but only to keep the defendant in prison until he pay them. For, for the fine due to the King, the court of Star-chamber cannot make forth any process for levying of the same, but they estreat the same into the Exchequer, which hath power by the law to write forth process to the Sheriff to levy the same. But if a man be convicted in the Star-chamber for forgery upon the statute of 5 Eliz. that in that case, for the double costs and damages, an English writ shall be made, directed to the Sheriff, &c. reciting the conviction, and the statute for levying of the said costs and damages of the goods and chattels, and profits of the lands of the defendant, and to bring in the money into the court of Star-chamber, and the writ shall be sealed with the great seal, and the test of the King: for the statute of 5 El. hath given jurisdiction to the court of Star-chamber, and power to give judgment (amongst other things) of the costs and damages, which being given by force of the said act of Parliament, by consequence * the court by the act hath power to grant execution; *quia quando aliquid conceditur, ei omnia concedi videntur per quæ devenitur ad illud.* And it was re-

Part XIII. MORSE and WEBB's Case.

solved, that the giving of the damages to the plaintiff was begun of late times : and although that one or two precedents were shewed against this resolution, they being against the law, the Judges had not any regard to them, The like resolution was in the case of Langdale in that court. See 12 Co. 58.]

(33) MORSE and WEBB's Case.

Hil. 7 Jacobi. 1.

In the Common Pleas.

IN a replevin brought by John Morfe against Robert Webb of the taking of two oxen the last day of November, in the third year of the reign of the King that now is, in a place called the Downfield in Luddington in the county of Worcester: the defendant, as Bailiff to William Sherington, Gent. made conufance, because that the place where, is an acre of land which is the freehold of the said William Sherington, and for damage-feafants, &c. In bar of which avowry the plaintiff said, that the said acre of land is parcel of Downfield, and that he himself at the time, and before the taking, &c. was and yet is seised of two yard-lands, with the appurtenances, in Luddington aforesaid: and that he, and all those whose estate he hath in the said two yards of land, time out of mind, &c. have used to have common of pasture *per totum contentum* of the said place called the Downfield, whereof, &c. for four beasts called rother-beasts, and two beasts called horse-beasts, and for sixty sheep, at certain times and seasons of the year, as to the said two yard-lands, with the appurtenances appertaining: and that he put in the said two oxen to use his common, &c. And the defendant did maintain his avowry, and traversed the prescription, upon which the parties were at issue, and the jury gave a special verdict, that before the taking, one Richard Morfe, father of the said John Morfe, and now plaintiff, whose heir he is, was seised of the said two yard-lands, and that the said Richard Morfe, &c. had the

Prescription for
common, &c.
traversed.
See 4 Co. 12.
8 Co. 65.
9 Co. 33 to 36.
10 Co. 107, &c.
2 Saund. 314.
1 Mod. 74.
2 Lev. 2.
1 Salk. 170.

the common of pasture for the said cattle, *per totum contentum* of the said Downfield, in manner and form as before is alleged; and being so seised, the said Richard Morse, in the twentieth year of Queen Eliz. demised to William Thomas and John Fisher divers parcels of the said two yard-lands, to which, &c. viz. the four butts of arable with the common and inter-common to the same belonging. for the term of four hundred years; by force of which the said William Thomas and John Fisher entered, and were possessed: and the said Rich. being so seised, died thereof seised; by which the said two yard-lands in possession and reversion descended to the said John Morse the now plaintiff: and if upon the whole matter, the said John Morse now hath, and at the time of the taking, &c. had common of pasture, &c. for four beasts called rother-beasts, and two beasts called horse-beasts, and for sixty sheep, &c. as to the said two yards of land, with the appurtenances belonging, in law or not, the jury prayed the advice of the court.

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1 Silk. 170.
Cro. El. 794,
570.

Note, that this plea began *Trin. 5 Jac. Rot. 1405*. And upon * argument at the bar, and at the Bench, it was resolved by the whole court, that it ought to be found against the defendant, who had traversed the prescription: for although that all the two yard-lands had been demised for years, yet the prescription made by the plaintiff is true; for he is seised in his demesne as of fee of the freehold of the two yards of land, to which, &c. And without question the inheritance and freehold of the common, after the years determined, is appendant to the said two yard lands; and therefore clearly the issue is to be found against the defendant: but if he would take advantage of the matter in law, he ought (confessing the common) to have pleaded the said lease; but when he traverseth the prescription, he cannot give the same in evidence.

2 Cro. 253.
Cro. El. 570.

2. It was resolved, that if the said lease had been pleaded, that the common, during the lease for years, is not suspended or discharged; for each of them shall have common rateable, and in such manner, that the land in which, &c. shall not be furcharged: and if so small a parcel be demised, which will not keep one ox, nor a sheep, then the whole common shall remain with the lessor, so always as the land in which, be not furcharged.

3. It was resolved, that common appendant to land, is as much as to say, common for cattle levant and couchant upon *that* land *to* which, &c. So that by the severance of part of the land *to* which, &c. no prejudice can come to the terre-tenant *in* which, &c.

4. See

Part XIII. HUGHES and CROWTHER's Case.

4. See the case of in the Fourth Part of my Reports, folio was affirmed for good law: and there is no difference, when the prescription is for cattle levant and couchant, and when for a certain number of cattle levant and couchant: but when the prescription is for common appurtenant to land without, (alleging that it is for cattle levant and couchant) there a certain number of the cattle ought to be expressed, which are intended by the law to be levant and couchant.

2 Saund. 324,
&c.
2 Cro. 574.
Q. 4 Co. 12, 31.

(34) HUGHES and CROWTHER's Case.

Hil. 7 Jac. 1.

In the Common Pleas.

IN a replevin between Robert Hughes plaintiff, and Richard Crowther defendant, which began *Trin. 6 Jac. Rot.* 2220. The case was, that Charles Fox was seised of six acres of meadow in Bedston, in the county of Salop, in fee, and 10 Octob. 9 Eliz. leased the same to Charles Hibbens and Arthur Hibbens for sixty years, if the aforesaid Charles Hibbens and Arthur Hibbens should so long live, and afterwards Charles died; and if the lease determine by his death, was the question; and it was adjudged, that by his death the lease was determined; for the life of a man is mere collateral unto the estate for years: otherwise it is, if a lease be made to one for the lives of J. S. and J. N. there the freehold doth not determine by the death of one of them, for the reasons and causes given in the case of Brudnel, in the Fifth Part of my Reports, fol. 9. Which case was affirmed to be good law by the whole court.

Leases.
1 Co. 155.
3 Co. 19.
5 Co. 9, 29.
6 Co. 26, 35.
11 Co. 3.
1 Mod. 187.

(35) HEYDON

Page [67] * (35) HEYDON and SMITH's Case.

J. l. Godb. 172. Pasch. 8 Jac. 1.

2. Brownl. 320.

See *Ashmead* In the Common Pleas.
in 1. L. Raym.

Manor customs.
See *Lex Maner-*
rior, 61 to 67.
1 Roll. Abr. 499.
4 Co. 24, 29.
8 Co. 63.
1 Roll. Abr.
Tit. Custom
E. 16.
1 Leon. 238.
Cro. Car. 221.
See Rep. Q. A.
18.

1 Brownl. 132.
4 Co. 30.

RICHARD HEYDON brought an action of trespass against Michael Smith and others, of breaking of his close called the More in Ugley in the county of Essex, the 25th day of June in the fifth year of the King, & *quandam arborem suam ad valentiam 40 s. ibidem nuper crescen' succiderunt*: the defendants said, that the close is, and at the time of the trespass was the freehold of Sir John Leventhorp, Knt. &c. and that the said oak was a timber-tree of the growth of thirty years and more, and justifies the cutting down of the tree by his commandment: the plaintiff replieth and saith, that the said close, and a house and twenty-eight acres of land in Ugley, are copyhold, and parcel of the said manor of Ugley, &c. of which manor Edward Leventhorp, Esq. father of the said Sir John Leventhorp, was seised in fee, and granted the said house, lands, and close to the said Richard Heydon and his heirs by the rod, at the will of the lord, according to the custom of the said manor: and that within the said manor there is such a custom, *quod quilibet tenens customar' ejusdem manerii sibi, & heredibus suis, ad voluntatem domini, &c. a toto tempore supradicto usus fuit, et consuevit ad ejus libitum amputare ramos omnimodarum arborum*, called pollengers, or hufbords, *super terris et tenem' suis customar' crescen' pro ligno combustibili, ad like libitum suum applicand' & in praedicto messuagio comburend'* and also to cut down and take at their pleasure all manner of trees called pollengers or hufbords, and all other timber trees, *super ejusdem customariis suis crescen'* for the reparation of their houses built upon the said lands and customary tenements; and also for ploughbote and cartbote, and that all trees called pollengers or hufbords, and all other trees at the time of the trespass aforesaid, or hitherto growing upon the aforesaid

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faid lands and tenements customary of the faid Richard Heydon, were not sufficient, nor did serve for the necessary uses aforesaid: and that the faid Richard Heydon, from the time of the faid grant made unto him, had maintained and preserved all trees, &c. growing upon the faid lands and tenements to him granted: and that after the death of the faid Edward Leventhorp, the faid manor descended to the faid Sir John Leventhorp: and that at the time of the trespass the aforesaid messuage of the faid Richard Heydon was in decay, & egebat necessariis reparationibus in maremio ejusdem. Upon which the defendant did demur in law.

And this case was oftentimes argued at the bar: and now this term it was argued at the bench by the Justices: and in this case these points were resolved.

1. That the first part of the custom was absurd and repugnant, *scil. Quod quilibet tenens customarii ejusdem manerii habens & tenens aliquas terras seu tenementa custom,* &c. *usus fuit amputare ramos omnimodarum arborum, vocat' pollengers, &c. in pro ligno combustibili, &c. in predicto messuagio comburend'* (which ought to be in the messuage of the plaintiff, for no other messuage is mentioned before) which is absurd and repugnant, that every customary tenant should burn his fuel in the plaintiff's house: but that branch of the custom doth not extend unto this case: for the last part of the custom, which concerneth the cutting down of the trees, concerns the point in question; and so the first part of the custom is not material.

It was objected, that the pleading, that the messuage of the plaintiff was in decay, & egebat necessariis reparationibus in maremio ejusdem, was too general: for the plaintiff ought to have shewed in particular, in what the messuage was in decay: as the book is in 10 E. 4. 3. He who justifieth for housebote, &c. ought to shew that the house hath cause to be repaired, &c.

To which it was answered by Coke Chief Justice, that the faid book proveth, the pleading in the case at bar was certain enough, *scil. Quod messuagium præd' egebat necessariis reparationibus in maremio*, without shewing the precise certainty: and therewith agrees 7 H. 6. 38. and 34 H. 6. 17.

2. It was also answered and resolved, that in this case without question it needs not to allege more certainty, for here the copyholder, according to the custom, doth not take it, but the lord of the manor doth cut down the tree, and carrieth it away where the rest was not sufficient, and so preventeth the copyholder of his benefit, and therefore he needeth

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Moor 49, 94,
392, 456, 811.
4 Co. 30.
8 Co. 63.
2 Salk. 368.

needeth not to shew any decay at all, but only for increasing of the damages, for the lord doth the wrong when he cutteth down the tree which should serve for reparations when need should be.

Estovers.
2 Brownl. 229.
2 Bulst. 281.
Godb. 173.

3. It was resolved, that of common right, as a thing incident to the grant, the copyholder may take as housebote, hedgbote, and ploughbote upon his copyhold: *quia concessio uno conceduntur omnia sine quibus id consistere non potest: et quando aliquis aliquid concedit, concedere videtur & id sine quo res ipsa esse non potest*: and therewith agreeth 9 H. 4. Waste 59. But the same may be restrained by custom, *scil.* that the copyholder shall not take it, unless by assignment of the lord or his Bailiff, &c.

Bote, its signifi-
cation.
See Co. Lit. 41.
b. and 127.
Spelman in
verbo.
Verstegan, 249.
Whitlock's MS.
in verbo.

4. It was resolved, that the lord cannot take all the timber-trees, but he ought to leave sufficient for the reparation of the customary houses, and for ploughbote, &c. for otherwise great depopulation will follow; *sc.* ruin of the houses, and decay of tillage and husbandry. And it is to be understood, that *bote* being an ancient Saxon word, hath two significations; the one *compensatio criminis*, as *frithbote*, which is as much as to say, to be discharged from giving amends for the breach of the peace; *manbote*, to be discharged of amends for the death of man: and secondly, in the later signification, (*scil.*) for reparation, as was bridgebote, burghbote, castlebote, parkbote, &c. *scil.* reparation of a bridge, of a borough, of a castle, of a park, &c. And it is to be known, that *bote* and *estovers* are all one: *estovers* are derived of this French word *estover*, *i. e.* *fovere*; *i. e.* to keep warm, to cherish, to sustain, to defend: and there are four kinds of *estovers*, (*scil.*) *ardendi*, *arandi*, *construendi*, & *claudendi*, (*scil.*) firebote, ploughbote, housebote, and hedgebote.

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5. It was resolved, that the copyholder shall have a general action of trespass against the lord, *quare clausum fregit*, & *arborem * suam*, &c. *succidit*; for custom hath fixed it to his estate against the lord: and the copyholder in this case hath as great an interest in the timber-trees, as he hath in his messuage which he holdeth by copy; and if the lord breaketh or destroyeth the house, without question the copyholder shall have an action of trespass against his lord, *quare domum fregit*, and by the same reason for the timber-trees which are annexed to the land, and which he may take for the reparation of his copyhold messuage, and without which the messuage cannot stand. Trin. 40 Eliz. Rot. 37. in the King's Bench,

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Bench, between Stebbing and Grosvenor, the custom of the manor of Netherhall in the county of Suffolk was, that every copyholder might lop the pollengers upon his copyhold *pro ligno combustibili*, &c. And the lord of the manor cut down the pollengers, being upon the plaintiff's copyhold, upon which he brought his action upon the case, because that the lops of the trees in such case did belong to the copyholder, and they are taken by the lord. See Taylor's case, in the Fourth Part of my Reports 30 & 31. and see 5 H. 4. 2. guardian in knight-service, who hath *custodiam terræ*, shall have an action of trespass for cutting down the trees against the heir who hath the inheritance. *Vide* 2 H. 4. 12. A copyholder brought an action of trespass, *Quare clausum fregit, & arbores succidit*: and see 2 E. 4. 15. A servant who is commanded to carry goods to such a place, shall have an action of trespass or appeal. 1 H. 6. 4. 7 H. 4. 15. 19 H. 6. 34. 11 H. 4. 28. If after taking the goods, the owner hath his goods again, yet he shall have a general action of trespass, and upon the evidence the damages shall be mitigated: so is the better opinion in 11 H. 4. 23. That he who hath a special property of the goods at a certain time, shall have a general action of trespass against him who hath the general property, and upon the evidence damages shall be mitigated; but clearly, the bailee, or he who hath a special property, shall have a general action of trespass against a stranger, and shall recover all in damages, because that he is chargeable over. See 21 H. 7. 14. b. acc. And it is holden in 4 H. 7. 3: that tenant at sufferance shall have an action of trespass in respect of the possession, and if the defendant plead not guilty, but he cannot make title, 30 H. 6. Trespass 10. 15 H. 7. 2. the King, who hath the profits of the land by outlawry, shall have an action of trespass, or take goods damage-feasants. 35 H. 6. 24. 30 H. 6. Trespass 10, &c. Tenant at will shall have an action of trespass, 21 H. 7. 15. and 11 H. 4. 23. If a man bail goods which are taken out of his possession, if the bailee recover in trespass, the same shall be a good bar to the bailee, 5 H. 4. 2. In a writ of waste brought against tenant for life, and assigned the waste in cutting down of trees; the defendant pleaded in bar, that the plaintiff himself cut them: and Culpeper, the Serjeant of the plaintiff, objected against it, that it should be no plea, because the defendant had not any thing in the freehold, no more than a mere stranger; and if a stranger had cut down the same trees, he should be chargeable in the waste.

Cro. El. 699.
Godb. 173.
2 Bulst. 281.
2 Brownl. 229.

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Also in this case, we should be at a mischief if we should not recover against him; for if at another time he bringeth an action of trespass against us, he shall recover damages against us for the cutting, *id est*, for the value of the trees: and yet it was holden by the court, that the same was a good bar: and it was said by the court that the plaintiff was not at any mischief in this case: for inasmuch as the defendant * shall have advantage now to discharge himself of waste against the plaintiff, upon this matter he shall not be barred for ever of his action of trespass, *scil.* to recover the value of the trees, which was the mischief objected by Culpeper: but without question he shall have an action of trespass, *Quare clausum fregit*, for the entry of the lessor, and for the cutting of the trees, but he shall not recover the value of the trees, because he is not chargeable over, but for the special loss which he hath, *scil.* for the loss of the pawnage, and of the shadow of the trees, &c. See Fitz. Trespass *ultimo*, in the Abridgment: and afterwards, the same term, judgment was given on the principal case for the plaintiff.

(36) PARISH-CLERK.

Pasch. 8 Jac. 1.

In the Common Pleas.

See Gibson's
Cod. 240.
2 Salk. 536.
2 Roll. 227.
Rep. Canon,
167, 565, 567.
See Fitzgib. 165,
166, and 272 to
374.

Prohibition.

THE parishioners of St. Alphage in Canterbury, by custom, ought to chuse the Parish-Clerk, whom they chuse accordingly: the Parson of the parish, by colour of a new canon made at the convocation in the year of the King that now is (which is not of force to take away any custom) drew the Clerk before Dr. Newman, Official of the Archbishop of Canterbury, to deprive him, upon the point of the right of election, and for other causes; and upon that it was moved at the bar to have a prohibition: and upon the hearing of Dr. Newman himself, and his counsel, a prohibition was granted by the whole court, because the party chosen is a mere

Part XIII. PRICHARD and HAWKINS's Case.

mere temporal man, and the means of chusing of him, *scil.* the custom is mere temporal, so as the official cannot deprive him; but upon occasion the parishioners might displace him; and this office is like to the office of a Church-warden, who although they be chosen for two years, yet for cause they (the parishioners) may displace them, as it is holden in 26 H. 8. 5. And although that the execution of the office concerneth divine service, yet the office itself is mere temporal. See 3 E. 3. Annuity 30. He who is Clerk of a parish is removeable by the parishioners. See 18 E. 3. 27. A gift in tail was made of the serjeanty or clerkship of the church of Lincoln, and there adjudged that the office is temporal, and shall not be tried in the ecclesiastical court, but in the King's court: and it is to be known, that the deprivation of a man of a temporal office or place, is a temporal thing, upon which no appeal lieth by the statute of 25 H. 8. but an assise, as in 4 Eliz. Dyer 209. The President of Magdalen-college in Oxford was deprived by the Bishop of Winchester their visitor; he shall not have an appeal to the delegates, for the deprivation is temporal, and not spiritual; but he may have an assise: and therewith agreeth the book of 8 Ass. Siracse's case: but if a Dean of a cathedral church, of the patronage of the King, be deprived before the Commissioners of the King, he may appeal to the delegates within the said act of 25 H. 8. For a deanery is a spiritual promotion, and not temporal: and before the said act, in such case, the appeal was to Rome immediately.

Antea 8, 9, &c.
17, 18, 41, &c.

See Skinner 468,
& 499, &c.

* (37) PRICHARD and HAWKINS's Case. Page [71]

Mich. 5 Jacobi Rot. 30.

In the King's Bench.

JOHAN PRICHARD brought an action upon the case against Robert Hawkins for slanderous words published the last day of August, in the third year of the King, viz. that Prichard, which serveth Mistress Shelley, did murder

Slander.

See 1 Danv. 104.
pl. 6, 12, & 14.
107, 108.
pl. 9. 140, 141.
pl. 1, to pl. 9.

DISON and BESTNEY's Case Part XIII.

murder Joan Adams's child, (*quondam Isabellam Adams modo defunctæ filiam cujusdam Johannis Adams*, of Williamstre in the county of Gloucester, *innuendo*) upon which a writ of error was brought in the Exchequer-chamber, upon a judgment given for Frichard in the King's Bench: and the judgment was reversed in Easter-term, 7 *Jacobi*, because it doth not appear, that Isabel was dead at the time of the speaking the words, for *tunc defunctæ* ought to have been in the place of *modo defunctæ*.

(38) DISON and BESTNEY's Case.

Pasch. 8 Jacobi 1.

In the King's Bench.

Slander.

Antea 59.

See 1 Danv. 113.

pl. 14, 16, 17,

117. pl. 41, 43,

119. pl. 50.

2 Salk. 691.

3 Wilson 59.

HUMPHRY DISON said of Nicholas Bestney, Utter Barrister and Counsellor of Gray's-Inn, "Thou a Barrister? Thou art no Barrister, thou art a Barretor; thou wert put from the bar, and thou darest not shew thyself there. Thou study law? Thou hast as much wit as a daw." Upon not guilty pleaded, the jury found for the plaintiff, and assessed damages to 23l. upon which judgment was given: and in a writ of error in the Exchequer-chamber, the judgment was affirmed.

(39) SMITH

(39) SMITH and HILL's Case.

Pasch. 8 Jacobi I.

In the King's Bench.

NOAH SMITH brought an action of assault and battery against Walter Hill in the King's Bench, which began *Pasch. 7 Jacobi, Rot. 175*, upon not guilty pleaded, a verdict and judgment was for the plaintiff, and 107l. assessed for damages and costs. In a writ of error brought in the Exchequer-chamber, the error was assigned in the *Venire facias*, which was certified by writ of *Certiorari*: and upon the writ, no return was made upon the back of the writ, (which is called *returnum album*;) and for that cause, this Easter term the judgment was reversed.

Error.
Return alb.
Qr. 5 Co. 2;
Part 39 to 47.
1 Danv. 180,
pl. 13.

* (40) WESCOT's Case. Page [72]

Trin. 7 Jacobi I.

In the Court of Wards.

IT was found by a writ of *Diem clausit extremum*, after the death of Roger Westcot, that the said Roger, the day that he died, was seised of and in the moiety of the manor of Trewalliard in his demesne as of fee, and of such his estate died thereof seised: and that the moiety of the said manor, anno 19 E. 3. was holden of the then Prince of Wales, as of his castle of Trematon, parcel of his duchy of Cornwall, by knight's service, as it appeareth by a certain exemplification of Trematon for the same Prince, made 9 Martii, 19 E. 3. And the words of the extent, were

Diem clausit extremum.
Vide ant. 48,
49, 50.
12 Co. 102.

Willielmus

WESTCOT'S Case. Part XIII.

Willielmus de Torr tenet duo feoda & dimid' militis apud Pick, Striklestomb, & Trewalliard, per servitium militare, & reddit inde per annum 8d. And it was resolved by the two Chief Justices, and the Chief Baron, that the office concerning the tenure was insufficient and void, because that the verdict of a jury ought to be full and direct, and not with a *prout patet*, for by that the whole force of the verdict relieth only upon the extent, which if it be false, he who is grieved shall have no remedy by any traverse; for they have not found the tenure indefinite which might be traversed, but with a *prout patet*, which makes the office in that point insufficient, and upon that a *Melius inquirendum* shall issue forth: and therewith agreeth F. N. B. 255. that a *Melius inquirendum* shall be awarded in such a case,

Vide ant. 48, 50.

Antea 47.
3 Co. 168.

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